2015

State of Utah, Plaintiff/Appellee, v. James Raphael Sanchez, Defendant/Appellant : Brief of Appellee

Utah Court of Appeals

Case No. 20140749-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

JAMES RAPHAEL SANCHEZ,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for murder, a first degree felony, and obstructing justice, a second degree felony, in the Third Judicial District, Salt Lake County, the Honorable Denise P. Lindberg presiding

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for murder, a first degree felony, and obstructing justice, a second degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West Supp. 2012).

INTRODUCTION

At 10:20 a.m. on June 5, 2011, Defendant made an anonymous 911 call from Angela Jenkin's apartment and reported that a woman was not breathing. Defendant did not mention that the woman, Angela, had stopped breathing two hours earlier. Nor did he mention that Angela had stopped breathing because he strangled her. Rather, Defendant hung up the phone, left the apartment door slightly ajar, and fled.

Minutes later, police opened Angela's door to find her body in a state of rigor mortis on the floor by her bed. Her face was swollen and purple with bruises. She also had bruises all over her body, a broken nose, seven broken ribs, and lips torn from her gums. Police found damp bloody towels, smudges on the bedroom walls where blood had been wiped away, and signs of blood wiped off the bathroom sink, tub, and floor.

Three hours later, police tracked Defendant down at a friend's house. In the police interview that followed, Defendant admitted that he had punched, slapped, kicked, and strangled Angela for several hours before she died. According to Defendant, Angela bled a lot, and the bloody towels and blood in the bathroom were from his attempts to stop the bleeding. Defendant claimed that after strangling Angela for the last time, he fell asleep for two hours.

STATEMENT OF THE ISSUES

1. At trial, Detective Reyes testified without objection to the admissions Defendant made in his police interview. On cross, Defendant tried to elicit his hearsay explanation for why he had attacked Angela – that she had repeatedly told him she was having an affair with his brother. Defendant argued that his explanation was admissible under rule 106, Utah Rules of Evidence, to clarify his admissions and to support his otherwise

unsupported extreme emotional distress mitigation defense. The trial court excluded the explanation as self-serving and unreliable hearsay that fell outside the scope of rule 106.

Did the trial court abuse its discretion in ruling that Defendant's self-serving hearsay explanation for why he killed his girlfriend was not admissible under rule 106, Utah Rules of Evidence?

Standard of Review. This Court reviews a trial court's ruling under rule 106, Utah Rules of Evidence, for abuse of discretion. *See State v. Jones*, 2015 UT 19, ¶¶12, 36-42, 345 P.3d 1195.

2. **Was evidence that Defendant tried to clean up the blood in the murder victim's apartment sufficient to support his obstructing justice conviction?**

Standard of Review. In sufficiency-of-the-evidence challenges, this Court views all "the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." *State v. Maestas*, 2012 UT 46, ¶177, 299 P.3d 892 (citation omitted). This Court "will not reverse a jury verdict" so long as "some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *Id.* (citation omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 76-5-203 (West Supp. 2009) (murder);
Utah Code Ann. § 76-5-205.5 (West Supp. 2009 (special mitigation);
Utah Code Ann. § 76-8-306 (West Supp. 2009) (obstructing justice);
Utah R. Evid. 106.

STATEMENT OF THE CASE

A. Summary of facts.

Mary Alice White lived with her mother in a second-floor apartment in Millcreek. R748:45,56-57. Angela Jenkins, Defendant's girlfriend, lived directly above them. R748:46,57;R749:74.

On May 4, 2011, Mary retired to her bedroom soon after 11:00 p.m. R748:46. Almost immediately, Mary heard noise and walking around upstairs. R748:46-47,51. Then, it sounded like the people upstairs were having sex. R748:47,53.

Around 1:00 a.m., the sounds upstairs changed. R748:48,51. Mary heard pounding, "some muffled yelling, some grunting, and then some running around here and there." R748:48,51,53. She also heard "a lot of crying, more so like despair." R748:48,51,53. The person yelling was a man, although Mary could not make out what he was yelling. R748:48. "The crying was definitely a female." R748:49.

Although Mary tried to fall asleep, "the noise was so loud from upstairs" that she couldn't. R748:49,58. Finally, between 3:00 a.m. and 4:00 a.m., Mary woke up her mother Blenda and asked her to call the police. R748:49-50.

Instead, Benda waited, listening to the noise for about two hours. Then, Blenda heard "a boom, boom, boom, boom, oooh, oooh" that scared her. R748:57-59. She tried to call Angela several times. R748:57-59. When no one answered, Blenda went upstairs and knocked on Angela's door, again to no avail. R748:60. After repeating that process several times—calling Angela and then going upstairs and knocking on her door—Blenda knew "something" was "wrong." At 5:49 a.m., Blenda finally called 911. R748:62,64,124. The noise from upstairs continued for another 30 minutes before it got a little quiet. R748:62-63.

Around 6:35 a.m., Officers Alan Morley and Ronnie Prescott were dispatched to Angela Jenkins' apartment on an "active domestic dispute." R748:68. When they arrived at Angela's door about five minutes later, they listened for sound, but it was very quiet. R748:71. Morley knocked on the locked door several times—each time louder—but no one answered. R748:71,73,77. Telephone calls to Angela's number went to voice mail. R7488:72. Morley cleared the call and left around 7:00 a.m. R748:75.

Although there was a brief period of silence upstairs, Mary heard noise almost until she left for work. R748:55. By the time she left at 8:15 a.m., however, "it was dead silent." R748:55.

About 10:00 a.m., Defendant called his friend Roger Gary Warner from Angela's apartment and asked Roger to pick him up. R748:90-92;R749:92,98. Twenty minutes later, Defendant made an anonymous 911 call from Angela's apartment and said that he needed an ambulance because a woman wasn't breathing. R748:126-27,130,134. Defendant hung up, left the door to Angela's apartment slightly ajar, and met Roger in the parking lot. R748:76,94;R749:13. Defendant again called 911 anonymously about five minutes later from a 7-Eleven across the street from Angela's apartment. R748:100-01,131. After briefly stopping at an ex-girlfriend's house, Defendant went to Roger's home. R748:101. On the way there, Defendant told Roger that he thought he might have killed Angela. R748:97. At Roger's house, Defendant took off his bloody pants and socks and took a nap. R748:102.

The fire department, ambulance, and Officers Morley and Prescott arrived at Angela's apartment within minutes of Defendant's 911 calls. R748:141. Finding the door ajar this time, the officers announced themselves and went inside. R748:79. In the living room, they found a

pillow with what appeared to be blood on it. R748:79;R749:15. In a back bedroom, they found blood spatter on the wall and Angela, partially clothed and badly beaten, lying on the floor by the bed. R748:79-80,143.

Fire medics confirmed that Angela was dead. R748:83,143. They saw "obvious signs of rigor mortis"—the stiffening of muscles that slowly begins after death. R748:143.159,160. One of those signs—one of Angela's arms was "independently staying up"—indicated that she had died at least two hours earlier and that either she or something around her had been moved since her death. R748:143.159,160;R749:16-17.

Officers found a pink bag in the kitchen sink and another near Angela's body. R749:15. They found a hole in the sheetrock over the bed that "looked like something had gone through [it] a couple of times." R749:17,24. They also found in the bedroom a pillowcase that "had quite a bit of blood on it," several blood spots on the mattress, and "quite a bit" of blood splatter on the wall. R749:17.

The color of the blood on the wall "seemed a little off," like it had been diluted. R749:17,21,23. The light switch also seemed to have diluted blood on it. R749:18. Police found "a lot" of bloody clothes and towels piled up in the hamper that looked like they had been saturated with water. R749:17-18,21. Near Angela's legs, they found wadded-up bloody and very

wet gauze, a bottle of peroxide and a spray bottle of antiseptic, and a pink hospital wash basin with blood in it. R749:18-20,22,28.

In Angela's bathroom, police found signs of blood in both the sink and bathtub. R749:32-33. In addition, it looked like someone had tried to wipe blood off the floor, vanity, and bathtub. R749:34-35,37-38.

Defendant's confession. By about noon, officers tracked Defendant down at Roger's house, although no one responded to their beating on the door, screaming, and using a loud speaker for an hour and a half. R748:104;R749:4-6. Finally, Roger left the house around 1:30 p.m. R749:6. He told police that his intent was to lead the police away from the house and then talk Defendant into meeting Roger later so that Defendant could turn himself in. R749:121.

It took negotiators another two hours to convince Defendant to come out. R749:6. When he did, he was not wearing either pants or socks. R749:9. Police recovered his blood-stained pants and socks later from Roger's house. R749:7.

Because Defendant told police that he had ingested 17 methadone pills, police took him to a hospital for treatment. R749:119. Defendant was also treated for a broken finger, which Defendant said he broke by punching the wall. R749:90.

Detective Reyes interviewed Defendant a few hours after his arrest. R749:120. Defendant said that he and Angela had been in a relationship for about six months. R749:94. Defendant admitted having a fight with Angela the night before, where he "slapped her" and "thumped her." R749:81-82. Defendant acknowledged "that it went farther than it should have." R749:81-82. Defendant said that the fight began when he "got mad at" Angela," and that he "pulled her hair," "slapped her," "choked her a little bit," and that "it was over from there." R749:82-83.

But then, Defendant admitted to kicking Angela with the heel of his foot near her hip area and possibly her shoulder and to stomping on her thigh. R749:87-88. He also admitted biting Angela's arm and possibly somewhere else. R749:88. And he admitted to grabbing her stomach and "clenching or pinching and pulling" her there. R749:88.

Defendant admitted too that he "grabbed" Angela's lips "with his hands and pulled them down and to the side," which "caused the tearing." R749:89,96. Although Defendant claimed that he hit Angela only once with a closed fist, he admitted that he "repeatedly slapped her back and forth" and "backhanded her," which he said hurt her nose. R749:89.

Defendant said that the assault lasted "probably a couple of hours," beginning the night before and ending "about eight or nine in the morning."

R749:90-91. He said that Angela fought back "a little bit, ... but not much because she's a woman." R749:91.

Defendant said that Angela "lost consciousness" a couple of times and that he tried to revive her "on a couple occasions by breathing for her." R749:86,91. Defendant said that he used Peroxide on Angela's face to help stop the profuse bleeding and to clean her up. R749:91,95-96. He also said that he took Angela, who weighed 216 pounds, "to the bathtub" and "put her head under the water." R748:174;R749:91,95-96.

Defendant said that Angela lost consciousness for the last time when he strangled her around 8:00 or 9:00 in the morning. R749:92. Defendant said that "he got her in a headlock at one point," but that "wasn't really having much effect." R749:97. Then, "with Angela lying on her back, and on the floor, he got on top of her and placed his elbow in her throat," but that also "wasn't having much effect." *Id.* So Defendant "used his forearm," "placed it across the front of her neck," and "leaned into her as she was lying in her back." *Id.* Angela "was just screaming." R749:90. Then, she blacked out and never regained consciousness. R749:97-98.

According to Defendant, he then lay down with Angela "and took a nap." R749:92,98. When he awoke and could not arouse Angela, Defendant

called Roger and then 911. R749:92,98. Defendant said that he left the house because Angela was not responding and he was scared. R749:92-93.

When asked why he had assaulted Angela, Defendant said he got mad because "he thought" Angela "was cheating on him" with his brother and "this enraged him," that Angela "admitted it and she kept saying it," and that when Defendant asked Angela to tell him she would stop, she "wouldn't tell me that" and "that hurt my feelings." R749:166-68.

The autopsy. The medical examiner, Dr. Todd Grey, autopsied Angela's body the next day. R748:155. For many autopsies, Dr. Grey needs only one sheet of paper with a body outline to record a person's injuries. R748:172. For Angela, he needed five sheets. R748:172.

One of the first things Dr. Grey noticed was that "because she had bled so much into her tissues" and "may have bled fairly extensive externally as well," Angela had very little lividity—the pooling of blood along gravity lines that normally occurs with death. R748:157-58.

Dr. Grey was most struck by the injuries to Angela's face, which were consistent with someone beating her with his hands and feet. R748:168. Dr. Grey found deep red bruising and swelling "essentially everywhere." R748:163-64. He found scraping across her forehead, hemorrhaging in the whites of her eyes, and a cut and fractured nose. R748:165. He found

bruising on Angela's chin, the inner surfaces of her scalp, and her brain. R748:167. Finally, Dr. Grey found tears of the inner surfaces on both Angela's upper and lower lips—"as if the lip had been pulled away from the gum"—which "would've bled fairly significantly." R748:165-66.

Dr. Grey also found substantial injuries to Angela's neck consistent with manual strangulation. R748:170-72. Specifically, he found diffused bruising "all across the front and sides" of Angela's upper neck. R748:169. He also found hemorrhaging in the main muscle that turns the neck and the deeper muscles surrounding the Adam's apple. R748:169.

Next, Dr. Grey found "extensive" bruises—"too numerous to count—on Angela's torso, abdomen, thighs, knees, shins, arms, hands, and buttocks. R748:172-73,178-80. To the extent there was any pattern in the bruises, Dr. Gray saw "lots of sort of distinct oval bruises grouped together," possibly caused by knuckles or some type of pinching. R748:173. A particularly large bruise across the left thigh was consistent with being kicked or stomped on. R748:178.

Dr. Grey also noted diffuse bruising on Angela's left forearm and hand that went "all the way around." R748:179. And he noted what looked like bite marks on Angela's right back and right buttock. R748:179.

Finally, Dr. Grey found eight fractured ribs, five on the right side and three on the left. R748:176. All the fractures "had bleeding associated with them." R748:176.

Dr. Grey testified that although Angela was on several prescribed medications, her system had scant amounts of them. R748:183-84. Angela's system had a more significant amount of methadone, but because she had been prescribed methadone "fairly regularly" for years, Dr. Grey concluded that the methadone did not contribute to her death. R748:185,187,196-97.

Dr. Grey concluded that Angela died from multiple intentionally-inflicted blunt force injuries and strangulation. He further concluded that either the blunt force injuries or the strangulation could have been lethal on their own. R748:157,189,192.

D.N.A. testing. Police sent several items for DNA testing—including a pillow case, Defendant's pants, a swab from Angela's bathroom, and a swab from Defendant's inner ear. R749:49-50. Blood from the pillow case contained both Defendant's and Angela's DNA. R749:55-56. Angela was the major contributor of the blood in Defendant's pants and the blood swab taken from her bathtub. R749:60,63. Angela was also a contributor to the blood found in Defendant's inner ear. R749:61.

B. Summary of proceedings.

Defendant was charged with one count of murder, a first degree felony, and one count of obstructing justice, a second degree felony. R1-3. At the close of the State's case-in-chief, Defendant unsuccessfully for a directed verdict on the obstructing justice charge. R750:35-36,38. The jury convicted Defendant as charged. R642.

The trial court sentenced Defendant to 15-years-to-life on the murder conviction and one-year-to-fifteen-years on the obstructing justice conviction. R726-27. The court ordered that the sentences run concurrent to each other but consecutive to sentences Defendant was already serving for his prior aggravated kidnapping and assault of Angela. R726-27.[1]

Defendant timely appealed. R728. The Utah Supreme Court transferred the appeal to this Court. R740-41.

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[1] Before Defendant's trial in this case, Defendant was convicted of aggravated kidnapping and assault with substantial bodily injury in connection with his assault of Angela two weeks before he murdered her. *See State v. Sanchez*, 2015 UT App 27, 344 P.3d 191. In that case, Defendant got mad at Angela after she said that his friend could not stay over. *Id.* ¶2. Defendant then hit Angela, bit her on the face, pulled her hair, and nearly bit her ear off. *Id.* When Angela escaped her apartment, Defendant dragged her 58 feet back to the apartment and closed her in it; a neighbor then heard what he thought was Defendant slamming Angela's her head into the wall. *Id.*

SUMMARY OF ARGUMENT

Point I. Defendant argues that the trial court committed reversible error when it allowed Detective Reyes to testify to Defendant's admissions about assaulting Angela, but prevented him from eliciting his explanation for why he assaulted Angela. Although Defendant acknowledges that his explanation for the assault was hearsay, he argues that it was admissible under rule 106, Utah Rules of Evidence, to support his extreme emotional distress mitigation defense and to explain his other admissions. Defendant argues that the alleged error was prejudicial because it violated his right to present his theory of the case to the jury.

Defendant's argument fails because whether or not the trial court's ruling was erroneous, the court's ruling did not preclude Defendant from presenting his defense. The ruling merely required Defendant to present his defense through other available means—i.e., his testimony.

Defendant's argument also fails because the trial court did not abuse its discretion. First, rule 106 does not overcome the proscription against inadmissible hearsay. Rule 106 allows the admission of additional portions of a writing recorded statement when—"in fairness"—those portions are necessary to explain or give context to otherwise misleading portions of the writing already admitted. But nothing in rule 106 renders otherwise

inadmissible hearsay admissible. Second, Defendant has not shown that Detective Reyes' testimony about Defendant's admissions was misleading. Thus, he cannot show why his self-serving after-the-fact hearsay explanation was necessary "in fairness" to clarify Detective Reyes' testimony.

But even if the trial court did err, Defendant cannot show prejudice. Indeed, given the evidence in this case—including the length and brutality of Defendant's attack on Angela and Defendant's conduct thereafter—any error in excluding Defendant's unreliable hearsay was harmless.

Point II. Defendant challenges the sufficiency of the evidence supporting his conviction for obstructing justice. To convict Defendant of obstructing justice, the State had to prove that Defendant (1) altered, destroyed, concealed, or removed any item or other thing (2) with the intent to hinder, delay or prevent the investigation, apprehension, prosecution, conviction, or punishment (3) regarding conduct that constitutes a first degree felony, in this case murder.

Here, the State presented evidence that Defendant brutally attacked Angela over some seven hours; that she lost consciousness several times during the attack; that Defendant did not respond to attempts to contact Angela during the attack; that Angela died at least two hours before

Defendant called 911; that Defendant moved her or something around her after she died; that Defendant not only cleaned blood off Angela but also tried to clean blood off her bedroom walls and the bathroom floor, vanity, and tub; that Defendant anonymously called 911; that Defendant fled; and that it took police some six hours to lure him out of his friend's house once they found him.

All this evidence supports a reasonable inference that Defendant not only knew that he had killed Angela, but that either while she was dying or after she had died, Defendant intentionally destroyed some of the blood evidence to hinder the investigation of Angela's murder.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THAT DEFENDANT'S SELF-SERVING HEARSAY EXPLANATION FOR WHY HE KILLED HIS GIRLFRIEND WAS NOT ADMISSIBLE UNDER RULE 106, UTAH RULES OF EVIDENCE.

As relevant here, Rule 106, Utah Rules of Evidence, provides that when a party introduces part of a writing or recorded statement, the opposing party may seek introduction of another part "which ought in fairness to be considered contemporaneously with it."

Defendant argues that the trial court erred under rule 106 when, after allowing Detective Reyes to present his admissions to brutally assaulting

Angela, it precluded him from eliciting on cross-examination the self-serving explanation he had given police for the assault—i.e., that Angela repeatedly told him she was having an affair with his brother and that, despite his requests, she had refused to end the affair. Aplt.Br. 14. Defendant acknowledges that his explanation to police was hearsay. *Id.* 9. He asserts that it was nonetheless admissible under rule 106 because it was "'relevant'" to his extreme emotional distress mitigation defense and "'necessary to qualify, explain, or place into context'" his admissions. *Id.* 14 (citation omitted). Defendant concludes that its exclusion was prejudicial because it violated his due process right to present his theory of the case.

Defendant's constitutional contention fails at the outset because the trial court's ruling did not deny him the opportunity to present an extreme emotional distress mitigation defense. To the contrary, Defendant always had the option to present his defense by taking the stand.

Defendant's argument, therefore, is limited to whether the trial court erred under rule 106. It did not. First, numerous courts have held that rule 106 does not allow the admission of a defendant's self-serving and otherwise inadmissible hearsay. Their reasoning is sound, and this Court should adopt it.

Second, even if rule 106 allowed the admission of self-serving hearsay under certain limited circumstances, such hearsay is admissible only when necessary "in fairness" to explain, clarify, or put in context statements already admitted that would otherwise be misleading. Here, Defendant's self-serving hearsay statements were not necessary to clarify misleading testimony concerning his admissions to brutally attacking Angela. Defendant sought admission of those statements only to minimize his culpability for the brutal attack by providing an after-the-fact explanation—that could not be challenged through cross-examination—for why he did it. Under such circumstances, the trial court did not abuse its discretion in ruling that rule 106 did not require admitting Defendant's self-serving statements.

Finally, Defendant cannot show prejudice. Given the evidence in this case, any error in not admitting Defendant's unreliable hearsay was harmless.

A. Proceedings below.

Before trial, the State filed a motion in limine asking the trial court to deny any request by Defendant to elicit his hearsay statements to Detective Reyes about why he assaulted Angela. R298-303. Defendant moved under rule 412, Utah Rules of Evidence, to admit evidence of Angela's sexual

history to support an anticipated extreme emotional distress mitigation defense that Defendant assaulted Angela only after she repeatedly told him that she was having an affair with his brother. R747:2-3;R.184-88,331-32,345-48.

On the first day of trial before jury voir dire, the trial court struck the State's motion in limine as untimely. R747:3. The court also denied Defendant's rule 412 motion. *Id.* Defense counsel asked whether the court's ruling meant that he could not elicit evidence that he "believed that Angela ... had sexual relations with his brother." *Id.* The trial court clarified that "[i]f [Defendant] testifies that he believed that she had had sex with his brother, ... he can give that testimony." R747:4. But when defense counsel suggested that he intended to elicit the evidence through other witnesses, the court responded, "that depends" on whether the evidence would be "admissible under the rules of evidence." R747:4. The State stated that if Defendant tried to present that evidence through Detective Reyes, the State would object to the evidence as "inappropriate hearsay." R747:8-9. The parties then stipulated that the State would not use evidence of Defendant's prior domestic violence against the victim in its case-in-chief unless the defense opened the door to the evidence. R747:18-19.[2]

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[2] *See State v. Sanchez*, 2015 UT App 27, 344 P.3d 191; *see also* fn.1 *supra*.

In opening statement, the State outlined the evidence it intended to present to support the charges, including Defendant's extensive admissions to Detective Reyes. R747:30-42. The defense responded that it intended to show that Defendant assaulted Angela while experiencing extreme emotional distress after learning that she "had had sexual relations with his brother." R747:43.

On direct, Detective Reyes testified to Defendant's admissions concerning his conduct during the assault. R149:78-116. On cross, Defendant tried to elicit his after-the-fact explanation for the assault—that Angela told him she was having an affair with his brother. R749:124. The State objected that the explanation was inadmissible hearsay. R749:124-25.[3]

In bench conference, the court ruled that it was Defendant's burden to prove extreme emotional distress mitigation by a preponderance and that the supporting evidence had to be admissible. R749:132. The court also ruled that if counsel was seeking to introduce hearsay, "unless you can give me an exception, it's not coming in." R749:127. The court tentatively sustained the State's objection pending further discussion. R749:127-29.

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[3] Transcripts of Detective Reyes' testimony and discussion concerning the State's objection are attached at Addendum B.

At the next recess, the trial court let defense counsel examine Detective Reyes to make a record of the evidence Defendant sought to have admitted. Reyes testified that Defendant said that he assaulted Angela because he got mad. R749:150. Reyes testified that Defendant said he got mad because "he thought" Angela "was cheating on him" with his brother and "this enraged him." Defendant told Reyes that Angela "admitted it and she kept saying it," and that when Defendant asked her to tell him she would stop, Angela "wouldn't tell me that" and "that hurt my feelings." R749:166-68.

Defendant then asserted five grounds on which these hearsay statements were admissible through Detective Reyes: (1) under the confrontation clause; (2) under rule 106, the rule of completeness; (3) to show bias; (4) they were not hearsay because they were not offered for the truth of whether Angela was cheating on him, "but to explain his conduct"; and (5) to show Defendant's state of mind and motive. R749:164; R750:5. After releasing the jury for the day, the court stated that it would research and consider the issue overnight. R749:170-73.

The next morning, the trial court ruled that none of Defendant's grounds supported introducing his hearsay statements through Detective Reyes. R750:5. The court rejected Defendant's confrontation clause

argument because "[t]o the extent he is seeking to elicit his own exculpatory statements through the detective, on its face it is clear that his statements are not the statements of a witness against him." R750:6. The court rejected Defendant's bias argument because the defense had pointed to nothing in Detective Reyes' testimony that suggested bias or anything other "than a straightforward response to [the parties'] questions." R750:9. The court rejected Defendant's argument that the statement was not being offered for the truth of the matter asserted because if it were so, Defendant had failed "to articulate its relevance." R750:10. The court rejected Defendant's "motive" argument because "the statement is an after-the-fact explanation that seeks to minimize his culpability for his admitted conduct towards the victim" and Defendant had not shown that it was made "under circumstances that indicate its reliability and trustworthiness." R750:10-12.

Finally, in rejecting Defendant's rule 106 argument, the court noted that under rule 106, it "must apply a fairness standard" and that it need "admit only those things that are relevant and necessary to qualify, explain, or place into context the portion that has already been introduced." R750:7. The court noted that here, "defendant seeks to admit statements that are essentially a self-serving, after-the-fact explanation for his conduct in assaulting the victim, and that portion of the overall interview was

temporally removed from the inculpatory statements that had been received without objection." R750:8. The court then ruled "that the fairness analysis does not require the admission of the statements offered to explain the reasons for his brutal assault on the victim." R750:8.

The court concluded by observing that it was "not sure that the defense has really thought through the potential implications had I ruled the other way. Had those statements been introduced, it would certainly open the door" for the State "to then put on all of the evidence of the defendant's prior convictions for his assaultive behavior on the very same victim just a few weeks prior, which would've totally undercut" Defendant's extreme emotional distress defense "that this was an out of character, extreme, overwrought, emotional response to a triggering event." R750:12-13.

In light of the trial court's ruling, defense counsel agreed that the record lacked any basis for an extreme emotional distress jury instruction. R750:13.

B. The trial court's ruling did not deprive Defendant of his right to present a complete defense.

Defendant's argument is premised on the assumption that the trial court's ruling denied him his due process right to present his theory of the case. *See* Aplt.Br. 14,17 (asserting that his hearsay statements were

"relevant" to his extreme emotional distress mitigation defense). Defendant then argues that because the ruling was erroneous and violated his constitutional right to present a defense, the State must show that the court's ruling was harmless beyond a reasonable doubt. *Id.* 17.

Defendant's claim fails at the outset because the trial court's exclusion of his hearsay did not deny him the opportunity to present an extreme emotional distress mitigation defense. To the contrary, Defendant always had the choice to present that mitigation defense by taking the stand and testifying.

Indeed, the Utah Supreme Court recognized this in *State v. Cruz-Meza*, 2003 UT 32, 76 P.3d 1165. After murdering his girlfriend, Cruz-Meza admitted to a friend that he had committed the murder, but claimed that he did so only because she refused to let him visit his son and then pointed a gun at him. *Id.* at ¶¶2,4. The trial court ruled that Cruz-Meza's oral explanation to his friend was untrustworthy and unreliable and thus

inadmissible to support an extreme emotional distress mitigation defense. *Id.* at ¶6.[4]

Like Defendant here, Cruz-Meza argued that "by excluding the statements in question, the trial court deprived [him] of the opportunity to present evidence supporting a defense of extreme emotional distress without taking the witness stand and waiving his privilege against self-incrimination." *Id.* at ¶16. That choice, Cruz-Meza argued, violated his right to due process. *Id.*

The supreme court held that Cruz-Meza's argument was "without merit." *Id.* at ¶16. The court noted that "'the completeness doctrine is not compelled by the Constitution.'" *Id.* at ¶17 (quoting 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure*, § 5077 (1977)). The court also noted that "'[n]either the Constitution nor Rule 106 ... requires the admission of the entire statement once any portion is admitted in a

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[4] Cruz-Meza brought his claim under the common law rule of completeness, which required admission of a complete statement whenever part of it was introduced. *See Cruz-Meza*, 2003 UT 32, ¶9. That rule has been supplanted by rule 106 as far as writings or recorded statements go. *Id.* Cruz-Meza's statements, however, were oral; thus, Cruz-Meza argued that they should have been admitted under the common law rule. *Id.* at ¶7. The Utah Supreme Court agreed with Cruz-Meza "that the rule of completeness may be applied to oral statements through rule 611, Utah Rules of Evidence, which requires trial courts to "make the presentation of evidence 'effective for the ascertainment of the truth.'" *Id.* at ¶10 (quoting Utah R. Evid. 611(a)).

criminal prosecution.'" *Id.* (quoting *United States v. Branch*, 91 F.3d 699, 729 (5th Cir. 1006)). The court then noted "that the fairness and trustworthiness tests are more than adequate to address any constitutional concerns with selective admission of oral statements by criminal defendants." *Id.* The court concluded: "Despite the difficulty in making a decision about whether to testify in his own defense, the fact remains that Cruz-Meza was entirely free to choose—the trial court's ruling excluding evidence did not compel him to testify." *Id.*

Thus, under *Cruz-Meza*, excluding a defendant's exculpatory hearsay statements does not deprive a defendant of his right to present a defense. Rather, at most, it requires a defendant to make the difficult decision about whether to testify in support of it. *Compare State v. McCullar*, 2014 UT App 215, ¶¶59, 335 P.3d 900 (holding that erroneous exclusion of out-of-court statements made by people *other than defendant*—and thus to which defendant could not testify--deprived defendant of meaningful opportunity to present defense).

Defendant's contention that the trial court's ruling violated his due process right to present a defense, therefore, fails. Consequently, Defendant can prevail on appeal only if he can show both that the trial court abused its discretion by excluding his hearsay statements and that he was prejudiced

by that error, i.e., that there is a "reasonable likelihood that it affected the outcome of the proceedings." *State v. Reece*, 2015 UT 45, ¶¶33, 40, 784 Utah Adv. Rep. 38 (holding that failure to give lesser offense instruction is "not harmful unless there is a reasonable likelihood" of a different result absent the error) (citation omitted).

C. The trial court did not abuse its discretion by excluding Defendant's self-serving hearsay under rule 106.

Defendant challenge only the trial court's ruling under rule 106 fails.

The common law doctrine or rule of completeness "generally provides that a party may introduce the whole of a statement if any part is introduced by the opposing party." *State v. Cruz-Meza*, 2003 UT 32, ¶9, 76 P.3d 1165. Until the adoption of uniform evidentiary rules, Utah recognized this common law doctrine. *See State v. Dunkley*, 39 P.2d 1097, 1109 (Utah 1935); *State v. Martin*, 300 P. 1034, 1038 (Utah 1931); *see also* Aplt.Br. 10,15 (citing both cases).

Today, rule 106 governs the admission of part or all of a written statement when one party admits another part of it:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing

> or recorded statement which ought in fairness to be considered contemporaneously with it.[5]

By its plain language, therefore, Rule 106 "codifies" the common law rule of completeness only "in part." *State v. Jones*, 2015 UT 19, ¶40, 345 P.3d 1195.

Unlike the common law rule—and contrary to Defendant's contention, *see* Aplt.Br. 15—rule 106 does not require the wholesale admission of every written or recorded statement merely because an opposing party relied on some part of it. Rather, its "function" is only "to prevent a 'misleading impression created by taking matters out of context.'" *Jones*, 2015 UT 19, ¶40 (quoting *State v. Leleae*, 1999 UT App 368, ¶44 n.6, 993 P.2d 232); *accord United States v. Branch*, 91 F.3d 669, 728 (5th Cir. 1006); *United States v. Sutton*, 801 F.2d 1346, 1360 (D.C. 1986); *United States v. Jamar*, 561 F.2d 1103, 1108 (4th Cir. 1977).[6] Rule 106 thus requires only the admission of those additional portions of a writing "relevant and necessary to qualify, explain, or place into context" an otherwise misleading "portion already introduced." *Leleae*, 1999 UT App 368, ¶43 (quoting *Branch*, 91 F.3d

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[5]This Court has held that rule 106 also applies "to transcribed oral statements that are used extensively at trial." *State v. Leleae*, 1999 UT App 368, ¶44 n.7, 993 P.2d 232.

[6]Federal cases interpreting analogous evidentiary rules are persuasive guidance to Utah courts in interpreting state evidence rules. *See Leleae*, 1999 UT App 368, ¶43 n.5.

at 728) (additional quotation marks and citations omitted); *accord Jones*, 2015 UT 19, ¶40; *State v. Cruz-Meza*, 2003 UT 32, ¶14, 76 P.3d 1165.

A trial court has "considerable discretion" under rule 106 "in determining issues of fairness." *Leleae*, 1999 UT App 368, ¶45; *accord Jones*, 2015 UT 19, ¶42.

1. The trial court did not abuse its discretion because rule 106 does not render inadmissible hearsay admissible.

Neither this Court nor the Utah Supreme Court "has [yet] had the occasion to decide" whether evidence proffered under rule 106 must be otherwise admissible. *See State v. Jones*, 2015 UT 19, ¶41 & n.56, 345 P.3d 195. For the reasons stated below, this Court should hold that evidence must be otherwise admissible and affirm the trial court.

"Generally, out-of-court statements offered for the truth of the matter asserted—hearsay—are not admissible." *State v. Nguyen*, 2011 UT App 2, ¶10, 246 P.3d 535; *see also* Utah R. Evid. 801(c) (hearsay is any out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement"); Utah R. Evid. 802 (hearsay "is not admissible except as provided by law or by these rules").

A declarant's out-of-court inculpatory statements are an exception. *See* Utah R. Evid. 801(d)(2) (opposing party's statements not hearsay when offered against that party); Utah R. Evid. 804(3) (exception to hearsay rule

for statements against a declarant's interests). This exception "is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*. 512 U.S. 594, 599 (1994). Such statements, therefore, are deemed reliable enough to allow their admission without the safeguards applicable to "in court statements—the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine." *Id.* at 598.

In contrast, a self-exculpatory out-of-court statement is "inherently unreliable," *State v. Fernandez*, 604 A.3d 1308, 1313 (Conn. App. 1992), because it has "nothing to guarantee its testimonial trustworthiness." *State v. Brooks*. 909 S.W.2d 854, 863 (Tenn. Ct. Crim. 1995) (citation omited). The "fact that a person is making a broadly self-inculpatory confession does not make more credible the non-self-inculpatory parts." *Williamson*. 512 U.S. at 599-600. This is because such statements "are *not* unambiguously adverse to the penal interest of the declarant,' but instead are likely to be attempts to minimize the declarant's culpability.'" *Lilly v. Virginia*, 527 U.S. 116, 132 (1999) (explaining why defendant's statements inculpating co-defendant are generally inadmissible against co-defendant) (emphasis in original). Such

statements, therefore, "are exactly the ones which people are most likely to make even when they are false." *Williamson*, 512 U.S. at 599-600.

Consequently, the hearsay rule requires that when "a party offers his own out-of-court declaration for its truth," that declaration "must satisfy the hearsay rule." Edward L. Kimball & Ronald N. Boyce, Utah Evidence Law 742 (1996). Several courts have held that rule 106 does not alter that requirement. *See, e.g., United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1375-76 (2d Cir. 1988) (rule 106 "does not compel admission of otherwise inadmissible hearsay evidence"); *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014) (rule 106 "'does not render admissible ... evidence which is otherwise inadmissible under the hearsay rules'") (citation omitted); *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir.1996) (rule 106 "does not compel admission of otherwise inadmissible hearsay evidence.").

Otherwise, as these courts have explained, a criminal defendant "would be 'able to place his exculpatory statements' before the jury without subjecting [himself] to cross-examination, precisely what the hearsay rule forbids.'" *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000) (citation omitted). A defendant would then "never want to testify" because he could "make evidence in his favor at his pleasure." *Fernandez*, 604 A.3d at 1313.

"The door would be thrown open to obvious abuse: an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence." *Brooks*. 909 S.W.2d at 863 (citation omitted).

This Court should follow the lead of these courts and commentators and hold that before hearsay is admissible under rule 106, its proponent must show that it fits within an exception to the hearsay rule. Because Defendant concedes that his statements were hearsay, this Court should also affirm the trial court's ruling.

2. Alternatively, the trial court did not abuse its discretion because rule 106's "fairness" standard did not require admission of Defendant's hearsay statements.

Even if rule 106 allowed otherwise inadmissible hearsay in limited circumstances, the trial court did not abuse its discretion in excluding the hearsay statements here, because they did not meet the rule's "fairness" requirement.

As stated, the purpose of rule 106 is only "to prevent a 'misleading impression created by taking matters out of context.'" *State v. Jones*, 2015 UT 19, ¶40, 345 P.3d 1195 (quoting *State v. Leleae*, 1999 UT App 368, ¶44 n.6, 993 P.2d 232). Rule 106 applies only when, "in fairness," other portions of a writing are "necessary to qualify, explain, or place into context" an

otherwise misleading "portion already introduced." *Leleae*, 1999 UT App 368, ¶43 (citations omitted); *accord Jones*, 2015 UT 19, ¶40; *State v. Cruz-Meza*, 2003 UT 32, ¶14, 76 P.3d 1165.

"Fairness does not require that the trial court allow admission of otherwise inadmissible hearsay." *Hawkins v. State*, 884 N.E.2d 939, 948 (Ind. Ct. App. 2008) (upholding exclusion of inadmissible hearsay under rule 106 where defendant did not testify and thus "admission of the excluded conversations would be unfair since the State could not question [defendant] as to their contents"); *United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014) (rule 106 does not require the blind "admission of self-serving, exculpatory statements made by a party which are being sought for admission by that same party").

Thus, rule 106 is not a means by which a defendant can simply "thwart hearsay rules and admit his entire statement without being subject to cross-examination." *McAtee v. Commonwealth*, 413 S.W.3d 608, 630-31 (Ky. 2013) (rule 106's fairness standard "does not mean that by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the [prosecution] opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination");

accord State v. Eugenio, 579 N.W.2d 642, 650-51 (Wis. 1998); *cf. People v. Davis*, 218 P.3d 718, 731 (Colo. Ct. App. 2008) ("[s]elf-serving hearsay declarations made by a defendant may [still] be excluded" under the rule of completeness "because there is nothing to guarantee their trustworthiness").

Rather, in "determining fairness," one issue is certainly "'whether the meaning of the included portion is altered by the excluded portion.'" *Sykes v. Commonwealth*, 453 S.W.3d 722, 726 (Ky. 2015). But courts may also consider whether admitting the unreliable hearsay statement "will insure a fair and impartial understanding of all of the evidence." *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992). Courts may also consider whether the probative value of the unreliable hearsay "is substantially outweighed by dangers of unfair prejudice, confusion of the issues, misleading the jury, or waste of time, Rule 403." Graham, *Handbook on Federal Evidence*, at §106.1 (4th ed. 1996). *Cf. State v. Cruz-Meza*, 2003 UT 32, ¶¶9-15, 76 P.3d 1165 (affirming exclusion of defendant's self-serving explanation to friend for why he killed girlfriend, where the statement lacked "any circumstantial guarantees of trustworthiness or indicia of reliability").

Defendant has not shown that the trial court abused its discretion under rule 106. Most importantly, except for one statement in which Defendant said he attacked Angela because he was mad, all of Defendant's statements elicited through Detective Reyes on direct examination were admissions regarding how Defendant assaulted Angela. R749:81-98. Thus, Detective Reyes' testimony went almost exclusively to Defendant's conduct, not to why Defendant engaged in the conduct.

Defendant makes no claim that Detective Reyes' testimony distorted or was otherwise misleading as to Defendant's conduct. *See* Aplt.Br. 8-20. *See United States v. Dorrell*, 758 F.2d 427, 435 (9th Cir. 1985) (removing defendant's explanation of "motivations for his actions did not change the meaning of the portions of his confession submitted to the jury" or "alter the fact that he admitted committing the acts with which he was charged").

Defendant thus has not shown that his self-serving statements regarding *why* he engaged in the conduct were necessary in fairness "to qualify, explain, or place into context" Detective Reyes' testimony concerning *what* Defendant's conduct was. *Leleae*, 1999 UT App 368, ¶43 (citation omitted); *see also United States v. Branch*, 91 F.3d 669, 728 (5th Cir. 1006) (neither rule 106 nor the rule of completeness required admitting defendant's exculpatory statements explaining why he picked up and fired

weapon). *Compare United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993) (in gun possession case, Haddad's denial that he knew a gun was under his bed was admissible to place in context his admission that he knew drugs were under the bed; without the denial, the drug admission unfairly implied that Haddad also admitted knowing the gun was there).

Admittedly, Detective Reyes' testimony that Defendant said he attacked Angela because he was mad addressed more than just Defendant's conduct. But Defendant's brief provides no insight as to how that statement was misleading. *See* Aplt.Br. 8-20. Nor can he, where the statement implies nothing about whether Defendant's anger was legally excusable or not. Thus, again, Defendant has not shown that his self-serving statements were necessary "to qualify, explain, or place into context" Detective Reyes' testimony. *Leleae*, 1999 UT App 368, ¶43 (citation omitted).

Finally, under rule 106's "fairness" standard, the trial court could properly consider whether it was fair to the State and the victim to admit Defendant's after-the-fact explanation that minimized his culpability by shifting part of the blame to his murder victim. *See Williamson v. United States*. 512 U.S. 594, 601 (1994) (exculpatory statements unreliable and "this is especially true" when the "statement implicates someone else"). Indeed, just as "a codefendant's statements about what the defendant said or did are

less credible than ordinary hearsay evidence," *Williamson*, 512 U.S. at 601, so too are a defendant's statements that cast aspersions on a victim who can no longer defend herself.

The trial court could also properly consider whether it was fair to the State and the victim to allow Defendant in a jury trial to rely on his inherently unreliable hearsay statements to assert a defense that he had the burden of proving and that the State could not cross-examine him on. *See Williamson v. State*, 707 A.2d 350, 361 (Dela. 1998) (upholding denial of rule 106 motion in light of rule 403, where defendant's decision to not testify denied State ability to test his credibility through cross-examination); *McAtee*, 413 S.W.3d at 630-31 (rule 106's fairness standard "does not mean that by introducing a portion of a defendant's confession in which the defendant admits the commission of the criminal offense, the [prosecution] opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination"); *cf. State v. Cruz-Meza*, 2003 UT 32, ¶16-17, 76 P.3d 1165 (rejecting defendant's claim that trial court's exclusion of his explanation for murder deprived him "of the opportunity to present evidence supporting a defense of extreme emotional distress without taking the witness stand").

All these considerations support the trial court's ruling precluding Defendant from eliciting his self-serving hearsay through Detective Reyes.

None of Defendant's cases undermine the trial court's ruling. *See* Aplt.Br. 12-14 (citing *Cox v. United States*, 898 A.2d 376 (D.C. 2006); *State v. Cabrera-Pena*. 605 S.E.2d 522 (S.C. 2004); *Long v. State*, 610 So.2d 1276 (Fla. 1992) (per curiam)). Defendant first cites *Cox*. Cox was arrested in the District of Columbia for having a gun without a license after his car was stopped on an unrelated matter. *Cox*. 898 A.2d at 378. When Cox saw the police looking inside his car, he told them that he did not have a license for the gun in the District but that his gun was registered in Maryland and that he had simply forgotten to take the gun out of the car after using it for target shooting the day before. *Id.* at 379. At trial, the police officer testified only to Cox's statement that he did not have a license. Cox sought to elicit the rest of his statement under rule 106 to clarify the mis-impression left by the officer's testimony that Defendant gave no innocent explanation for having the gun. *Id.* at 379-80. The trial court denied Cox's request on the ground that his statements were inadmissible hearsay and not necessary under rule 106. *Id.* The appellate court held that the trial court erred. The court first concluded that Cox's statements were not hearsay because they were not offered for their truth but merely to show that they were made. *Id.*

380-81. The court then held the evidence was necessary under rule 106 to clarify the misimpression left by the officer's testimony, but that any error was harmless. *Id.* at 381-83.

Unlike Cox, Defendant acknowledges that his self-serving statements were offered to support his extreme emotional distress defense and were thus hearsay. Aplt.Br. 9-10. Also unlike Cox, Defendant has made no showing that his hearsay statements were necessary to clarify any testimony under rule 106. *Id.* 8-20. *Cox*, therefore, is distinguishable.

Cabrera-Pena is likewise distinguishable, but for different reasons. First, unlike here, *Cabrera-Pena* involved an unrecorded oral statement. *State v. Cabrera-Pena*. 605 S.E.2d 522, 524-26 (S.C. 2004). Second, unlike Utah, which limits the reach of rule 106 to only those portions of a statement necessary to clarify portions already admitted, South Carolina appears to superimpose the common law rule of completeness onto its rule 106 analysis. *See id.* (holding under case law that when one part of conversation admitted, adverse party entitled to prove remainder, so long as relevant).

Finally, *Long* involved the State's use of a brief excerpt of a television interview with Long, Long had been denied access to the complete interview. *Long v. State,* 610 So.2d 1276, 1279-80 (Fla. 1992) (per curiam).

The appellate court held that Long's inability to access the complete interview precluded him from determining whether he was "entitled to bring out the remainder" of the video under rule 106. *Id.* 1280. Thus, *Long* did not involve a defendant's attempt to admit evidence under rule 106; rather, it involved a defendant's ability to discover evidence that, depending on what it revealed, might have been admissible under rule 106. *Id.*

In sum, Defendant has not shown that the trial abused its discretion when it precluded him from eliciting his self-serving hearsay statements.

3. Finally, even if the trial court erred, Defendant's claim fails for lack of prejudice.

Finally, even if the trial court abused its discretion in excluding Defendant's proffered statements, Defendant cannot show prejudice.

Defendant claims he was prejudiced because the trial court's ruling "completely precluded [him] from presenting his theory of the case," thereby depriving him "of his due process right to present a complete defense." Aplt.Br. 17. Defendant argues that if the court had permitted his self-serving hearsay statements, he "would have been entitled to a jury instruction on special mitigation due to extreme emotional distress." *Id.* 19. Defendant speculates that "the jury may well have found special mitigation

by a preponderance of the evidence" because "the evidence was consistent with [his] theory" that he acted under extreme emotional distress. *Id.* 20.

Based on his assertion that the trial court's alleged error violated his due process rights, Defendant argues the error was harmful unless the State proves that it was harmless beyond a reasonable doubt. Aptl.Br. 17; *see also State v. Calliham*, 2002 UT 86, ¶45, 55 P.3d 573 (when error involves a constitutional violation, State must prove error is harmless beyond a reasonable doubt). As demonstrated, however, the trial court's error—if any—did not deprive Defendant of his right to present a defense. *See* Point I.C. *supra*; *State v. Cruz-Meza*, 2003 UT 32, ¶¶16-17, 76 P.3d 1165 (rejecting defendant's contention that exclusion of his hearsay statements deprived him of right to present an extreme emotional distress defense, where "Cruz-Meza was entirely free to choose" to present evidence supporting his defense by testifying).

The trial court's error, if any, therefore, was not a constitutional one. Consequently, prejudice exists only if Defendant can show a reasonable likelihood of a different result absent the error. *See State v. Williams*, 2014 UT App 198, ¶20, 333 P.3d 1287. Defendant has not made and cannot make that showing here.

First, contrary to Defendant's suggestion, *see* Aplt.Br. 19, a defendant is not entitled to an instruction on his theory of defense merely because some evidence—however unreliable—supports that theory. *See, e.g. Clark v. State*, 928 So.2d 193, 196 (Miss. Ct. App. 2006) ("Each party has the right to have his theory of the case presented to the jury by instructions, provided that there is *credible* evidence that supports that theory.") (emphasis added); *accord People v. Preciado-Flores*, 66 P.3d 155, 163 (Colo. Ct. App. 2002); *Samson v. State.*, 69 P.3d 1154, 1160 (Mont. 2003); *Foster v. Commonwealth*, 412 S.E.2d 198, 200 (Va. Ct. App. 1991). Rather, he is entitled to an instruction only when the evidence provides a "*reasonable* basis for the jury to conclude that" the theory applies. *State v. Martinez*, 2013 UT App 154, ¶3, 304 P.3d 110 (discussing defendant's right to a self-defense instruction) (citation omitted; alterations in original) (emphasis added).

Thus, even in cases where the defendant carries no burden of proof at all, if "the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind" as to whether a defense applies, "tendered instructions thereon are properly refused." *State v. Maestas*, 564 P.2d 1386, 1389-90 (Utah 1977) (citation omitted); *accord State v. Kell*, 2002 UT 106, ¶25, 61 P.3d 1019; *see also State v. Drej*, 2010 UT 35, ¶15, 233 P.3d 476 (State must disprove existence of affirmative defense beyond a reasonable doubt once

defendant produces some evidence to support it). Here, Defendant had the burden of proving his special mitigation defense. *See Drej*, 2010 UT 25, ¶21 (recognizing that special mitigation statute places burden of proof on defendant to prove mitigating circumstances by a preponderance of the evidence); Utah Code Ann. § 76-5-205.5 (West Supp. 2009) (defining extreme emotional distress as special mitigation). The evidentiary basis supporting the defense, therefore, must be at least that high.

But no matter what the level of reasonable basis is required, Defendant would not have met it even had the trial court admitted his hearsay statements. That is because Defendant's claim to an extreme emotional distress mitigation defense turns on his own self-serving and thus inherently unreliable hearsay statements. *See* R750:13 (defense acknowledging that no evidence supports extreme emotional distress instruction without Defendant's self-serving hearsay statement); *see also State v. Fernandez*, 604 A.2d 1308, 1313 (Conn. Ct. App. 1993) (self-exculpatory out-of-court statements are "inherently unreliable"). And Defendant's unreliable hearsay statements here do not constitute a "reasonable basis" for the jury to conclude that his extreme emotional distress mitigation defense applies, let alone a reasonable basis to conclude

that he has proven that defense by a preponderance of the evidence. *Martinez*, 2013 UT App 154, ¶3.

Finally, even if Defendant's hearsay statements could have justified an extreme emotional distress defense in this case, any error in excluding them was harmless because "*no* reasonable likelihood exists that the error affected the outcome" of Defendant's case. *State v. Ferguson*, 2011 UT App 77, ¶19, 250 P.3d 89 (emphasis added).

The evidence in this case shows that Defendant brutally attacked Angela for some six hours; that in the process, he tore Angela's lips out, strangled her several times, stomped on her, and broke eight ribs; that he delayed calling for help for over two hours after Angela died and then did so only anonymously; that he manipulated Angela's body after she died; that he spent time trying to clean up the mess he had made not only trying to clean up Angela, but by trying to wipe blood off her bedroom walls and her bathroom floor, vanity, and tub; and that he then fled to a friend's house and refused to come out for six hours after police had arrived. *See* Summary of Facts, *supra.*

Given this evidence, no reasonable jury would have believed that Defendant tortured Angela for six hours and then killed her only in a bout of "extreme emotional distress for which there [was] a reasonable

explanation or excuse." Utah Code Ann. § 76-5-205.5(1)(b). Indeed, there was nothing reasonable about Defendant's prolonged and brutal attack.

That the jury would reject Defendant's defense is even more certain where, as the trial court stated, the admission of Defendant's statements would have opened the door to evidence of Defendant's prior similar attacks on Angela, including an attack just two weeks before he killed her. R750:12-13. *See, e.g.,State v. Sanchez*, 2015 UT App 27, 344 P.3d 191 (affirming Defendant's convictions for aggravated kidnapping and assault with substantial bodily injury after Defendant got mad at Angela because she would not let a friend stay over and hit her, pulled her hair, and almost bit her ear off). As the trial court noted, that evidence "would've totally undercut" any contention that Defendant's deadly attack on Angela "was an out of character, extreme, overwrought, emotional response to a triggering event." *Id.*

In short, even if the trial court's ruling was erroneous, the error was not only harmless. *See State v. Williams*, 2014 UT App 198, ¶20, 333 P.3d 1287 (evidentiary errors are harmless if there is no reasonable likelihood that error affected the result).

II

EVIDENCE THAT DEFENDANT TRIED TO CLEAN UP THE BLOOD IN THE MURDER VICTIM'S APARTMENT WAS SUFFICIENT TO SUPPORT HIS OBSTRUCTING JUSTICE CONVICTION

Defendant argues that the evidence was insufficient to support his obstructing justice conviction. Aplt.Br. 20-32. Specifically, Defendant contends that the evidence was insufficient to support that he intended to kill Angela or that he cleaned up the apartment after she died with the intent to conceal evidence. *Id.* 20. Defendant also asserts that any contention that he intended to hinder a murder investigation, "was belied by the fact that bloodstains pervaded the crime scene" and he "himself called the police and left the door open for them." *Id.* 28. In short, Defendant argues, "there was no evidence" that he "ever concealed or destroyed evidence specifically intending to hinder the investigation of Angela's murder." *Id.* 31.

In a sufficiency challenge, this Court views "the evidence and all inferences drawn therefrom in a light most favorable to the jury's verdict." *State v. Holgate*, 2000 UT 74, ¶18, 10 P.3d 346. This Court reverses only if, "in that light, 'the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was

convicted.'" *State v. Ricks*, 2013 UT App 238, ¶5, 314 P.3d 1033 (quoting *Holgate*, 2000 UT 74, ¶18). "So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made," this Court's "inquiry stops." *State v. Boyd*, 2001 UT 30, ¶16, 25 P.3d 985.

Here, the jury was instructed that to convict Defendant of obstructing justice, it had to find that he:

> 2. altered, destroyed, concealed, or removed any item or other thing.
>
> 3. That [he] acted with intent to hinder, delay or prevent the investigation, apprehension, prosecution, conviction, or punishment regarding conduct that constitutes a criminal offense; AND
>
> 4. That [his] conduct constituted the criminal offense of murder.

R668 (Instr. 23). *See also* Utah Code Ann. § 76-8-306(1)(c), (3)(a) (West Supp. 2014) (defining second degree felony obstruction of justice).

At trial, the State presented the following evidence supporting Defendant's guilt of that crime:

- Defendant assaulted Angela for some six hours, R748:48-51,57-64;R749:90-91;
- Defendant punched, slapped, kicked, stomped on, and strangled Angela, R749:81-98;
- Angela lost consciousness several times, R749:86,91;

- due to the injuries Defendant inflicted on her face, Angela likely bled substantially, but she had relatively little blood on her face when police found her, R748:157-58,165-66; St.Exh. 7A;

- both neighbors and police called and checked on Angela's apartment before 7:00 a.m., but no one answered, R748:57-64; 71-75;

- Angela died at least two hours before Defendant called for help at 10:00 a.m., 748:143,159-60; R:749:16-17;

- either Angela or items around her had been moved after rigor mortis had set in, R749:16-17;

- police found a wet, bloody wad of gauze near Angela's legs, as well as an empty bottle of peroxide and a spray bottle of antiseptic, R749:18-20,28;

- police found dripping-wet, bloody towels in a hamper, R749:17-18,21;

- police found smears of diluted blood on Angela's bedroom walls and a light switch, R749:17-18,21,23;

- police found that blood had been sufficiently wiped off Angela's bathroom floor, vanity, and tub to no longer be visible to the naked eye, R749:34-35,37-38;

- although Angela had been dead for at least two hours by the time Defendant called 911, he did not report a death, but only that a woman was not breathing, R748:126-27,130,134;

- Defendant called 911 anonymously and then fled, R748:76,94,126-27,130-134;R749:13.

The evidence of the brutal attack, the lack of response when neighbors and police checked in on the apartment, the fact that Angela had

died several hours before Defendant called 911, and the fact that either Angela or items around her were moved after rigor mortis had set in all support a reasonable inference that at some point—either before Angela actually died or after—Defendant realized he had killed her.

The evidence of the bloody injuries to Angela's face, the relative lack of blood on her face when police found her, the bloody wad of gauze near her, the soaking wet, bloody towels found in the hamper, the diluted blood on the bedroom walls, and the latent blood on the bathroom floor, vanity, and tub all support a reasonable inference that sometime after that realization, Defendant tried to clean up—i.e., "alter[], destroy[], conceal[], or remove[]"—evidence showing not only that he killed Angela during a brutal attack but how brutal the attack actually was. Utah Code Ann. § 76-8-306(1)(c).

Finally, evidence that Defendant did not respond when neighbors and police checked in on the apartment, that he waited two hours before calling 911, that he called 911 anonymously, and that when he called 911, he did not report a death but only a person not breathing all support a reasonable inference that Defendant's intent was "to hinder, delay or prevent the investigation, apprehension, prosecution, conviction, or punishment" regarding Angela's murder. Utah Code Ann. § 76-8-306(1)(c).

Defendant's contends, however, that there was no evidence to support that he ever intended to murder Angela. Aplt.Br. 20. Defendant's contention is not credible on its face. But even if it were, Defendant's murder charge in this case did not require proof that Defendant intended to kill Angela. R662; *see also* Utah Code Ann. § 76-5-203(2) (homicide constitutes murder if the actor causes the death "intentionally or knowingly" *or* if "intending to cause serious bodily injury to another," he "commits an act clearly dangerous to human life" *or* if "acting under circumstances evidencing a depraved indifference to human life," he "knowingly engages in conduct which creates a crave risk of death to another and thereby causes the death of another"). Nor did obstructing justice charge. Rather, it required proof only that at some point Defendant realized he had. *See* Utah Code Ann. § 76-8-306(1)(c).

Contrary to Defendant's contention, therefore, the State presented more than sufficient "evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *Boyd*, 2001 UT 30, ¶16.

In asserting otherwise, heavily on his description of his conduct to police—such as that he used the gauze on Angela to try to revive her; that after she lost consciousness that last time, he fell asleep for two hours; and

that he was distraught when Detective Reyes told him Angela was dead. Aplt.Br.26-29. But the jury was under no obligation to believe Defendant's statements. *Cf. Sate v. Reece*, 2015 UT 45, ¶41, 784 Utah Adv. Rep. 38 ("Essentially, Mr. Reece asked the jury to believe that sometime during a crime scene that spanned two hours and in which he committed multiple felonies, he felt compelled to stop at the victim's him just to be a good citizen. We find his story to be simply incredible.").

Alternatively, Defendant argues that the State presented no evidence "that he concealed evidence specifically intending to hinder the investigation" of Angela's murder. Aplt.Br. 29. But as this Court has repeatedly held, "[k]nowledge or intent is a state of mind generally to be inferred from the person's conduct viewed in light of all the accompanying circumstances." *State v. Bingham*, 2015 UT App 103, ¶29, ___ P.3d ___ (quoting *State v. Kihlstrom*, 1999 UT App 289, ¶10, 988 P.2d 949). And as stated, the jury had more than enough evidence in this case—including Defendant's cleaning up blood from bedroom walls and bathroom floors and moving Angela's body after she died—from which to infer the necessary intent.

Finally, Defendant argues that the evidence was insufficient because "bloodstains pervaded the crime scene" and he "himself called the police."

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 11,056 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

Karen A. Klucznik

KAREN A. KLUCZNIK
Assistant Attorney General

Aplt.Br. 28. But Defendant called the police anonymously, and concealing the murderer's identity would certainly hinder the murder investigation; indeed, it let Defendant flee from the scene. R748:126-27,130,134. Also, the obstructing justice statute requires only proof that the person concealed or altered one item or thing. *See* Utah Code Ann. § 76-8-306(1)(c) (requiring proof that the defendant "altered, destroyed, concealed, or removed *any item or other thing*") (emphasis added). Thus, the fact that Defendant was not particularly good at concealing evidence—i.e., that he was not successful in concealing every piece of it—does not defeat his obstructing justice conviction.

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant's convictions.

Respectfully submitted on June 3, 2015.

SEAN D. REYES
Utah Attorney General

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CERTIFICATE OF SERVICE

I certify that on June 3, 2015, two copies of the Brief of Appellee were

☐ mailed ☑ hand-delivered to:

John B. Plimpton
Ralph W. Dellapiana
Salt Lake Legal Defender Assoc.
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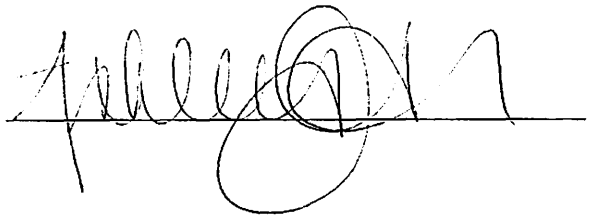
Salt Lake City, Utah 84111-3305

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addendum A

Utah Code Ann. § 76-5-203 (West Supp. 2009)

(1) As used in this section, "predicate offense" means:

(a) a clandestine drug lab violation under Section 58-37d-4 or 58-37d-5;

(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;

(c) kidnapping under Section 76-5-301;

(d) child kidnapping under Section 76-5-301.1;

(e) aggravated kidnapping under Section 76-5-302;

(f) rape of a child under Section 76-5-402.1;

(g) object rape of a child under Section 76-5-402.3;

(h) sodomy upon a child under Section 76-5-403.1;

(i) forcible sexual abuse under Section 76-5-404;

(j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;

(k) rape under Section 76-5-402;

(l) object rape under Section 76-5-402.2;

(m) forcible sodomy under Section 76-5-403;

(n) aggravated sexual assault under Section 76-5-405;

(o) arson under Section 76-6-102;

(p) aggravated arson under Section 76-6-103;

(q) burglary under Section 76-6-202;

(r) aggravated burglary under Section 76-6-203;

(s) robbery under Section 76-6-301;

(t) aggravated robbery under Section 76-6-302;

(u) escape or aggravated escape under Section 76-8-309; or

(v) a felony violation of Section 76-10-508 or 76-10-508.1 regarding discharge of a firearm or dangerous weapon.

(2) Criminal homicide constitutes murder if:

(a) the actor intentionally or knowingly causes the death of another;

(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;

(c) acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(d)(i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;

(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer or military service member in uniform while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4;

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer; or

(iii) an assault against a military service member in uniform under Section 76-5-102.4;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(4); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

(3)(a) Murder is a first degree felony.

(b) A person who is convicted of murder shall be sentenced to imprisonment for an indeterminate term of not less than 15 years and which may be for life.

(4)(a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another under a reasonable belief that the circumstances provided a legal justification or excuse for the conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) The reasonable belief of the actor under Subsection (4)(a) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(c) This affirmative defense reduces charges only from:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter.

(5)(a) Any predicate offense described in Subsection (1) that constitutes a separate offense does not merge with the crime of murder.

(b) A person who is convicted of murder, based on a predicate offense described in Subsection (1) that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Utah Code Ann. § 76-5-205.5 (West Supp. 2009)

(1) Special mitigation exists when the actor causes the death of another or attempts to cause the death of another:

(a)(i) under circumstances that are not legally justified, but the actor acts under a delusion attributable to a mental illness as defined in Section 76-2-305;

(ii) the nature of the delusion is such that, if the facts existed as the defendant believed them to be in the delusional state, those facts would provide a legal justification for the defendant's conduct; and

(iii) the defendant's actions, in light of the delusion, were reasonable from the objective viewpoint of a reasonable person; or

(b) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.

(2) A defendant who was under the influence of voluntarily consumed, injected, or ingested alcohol, controlled substances, or volatile substances at the time of the alleged offense may not claim mitigation of the offense under Subsection (1)(a) on the basis of mental illness if the alcohol or substance caused, triggered, or substantially contributed to the mental illness.

(3) Under Subsection (1)(b), emotional distress does not include:

(a) a condition resulting from mental illness as defined in Section 76-2-305; or

(b) distress that is substantially caused by the defendant's own conduct.

(4) The reasonableness of an explanation or excuse under Subsection (1)(b) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(5)(a) If the trier of fact finds the elements of an offense as listed in Subsection (5)(b) are proven beyond a reasonable doubt, and also that the existence of special mitigation under this section is established by a preponderance of the evidence, it shall return a verdict on the reduced charge as provided in Subsection (5)(b).

(b) If under Subsection (5)(a) the offense is:

(i) aggravated murder, the defendant shall instead be found guilty of murder;

(ii) attempted aggravated murder, the defendant shall instead be found guilty of attempted murder;

(iii) murder, the defendant shall instead be found guilty of manslaughter; or

(iv) attempted murder, the defendant shall instead be found guilty of attempted manslaughter.

(6)(a) If a jury is the trier of fact, a unanimous vote of the jury is required to establish the existence of the special mitigation.

(b) If the jury does find special mitigation by a unanimous vote, it shall return a verdict on the reduced charge as provided in Subsection (5).

(c) If the jury finds by a unanimous vote that special mitigation has not been established, it shall convict the defendant of the greater offense for which the prosecution has established all the elements beyond a reasonable doubt.

(d) If the jury is unable to unanimously agree whether or not special mitigation has been established, the result is a hung jury.

(7)(a) If the issue of special mitigation is submitted to the trier of fact, it shall return a special verdict indicating whether the existence of special mitigation has been found.

(b) The trier of fact shall return the special verdict at the same time as the general verdict, to indicate the basis for its general verdict.

(8) Special mitigation under this section does not, in any case, reduce the level of an offense by more than one degree from that offense, the elements of which the evidence has established beyond a reasonable doubt.

Utah Code Ann. § 76-8-306 (West Supp. 2009)

(1) An actor commits obstruction of justice if the actor, with intent to hinder, delay, or prevent the investigation, apprehension, prosecution, conviction, or punishment of any person regarding conduct that constitutes a criminal offense:

(a) provides any person with a weapon;

(b) prevents by force, intimidation, or deception, any person from performing any act that might aid in the discovery, apprehension, prosecution, conviction, or punishment of any person;

(c) alters, destroys, conceals, or removes any item or other thing;

(d) makes, presents, or uses any item or thing known by the actor to be false;

(e) harbors or conceals a person;

(f) provides a person with transportation, disguise, or other means of avoiding discovery or apprehension;

(g) warns any person of impending discovery or apprehension;

(h) warns any person of an order authorizing the interception of wire communications or of a pending application for an order authorizing the interception of wire communications;

(i) conceals information that is not privileged and that concerns the offense, after a judge or magistrate has ordered the actor to provide the information; or

(j) provides false information regarding a suspect, a witness, the conduct constituting an offense, or any other material aspect of the investigation.

(2)(a) As used in this section, "conduct that constitutes a criminal offense" means conduct that would be punishable as a crime and is separate from a violation of this section, and includes:

(i) any violation of a criminal statute or ordinance of this state, its political subdivisions, any other state, or any district, possession, or territory of the United States; and

(ii) conduct committed by a juvenile which would be a crime if committed by an adult.

(b) A violation of a criminal statute that is committed in another state, or any district, possession, or territory of the United States, is a:

(i) capital felony if the penalty provided includes death or life imprisonment without parole;

(ii) a first degree felony if the penalty provided includes life imprisonment with parole or a maximum term of imprisonment exceeding 15 years;

(iii) a second degree felony if the penalty provided exceeds five years;

(iv) a third degree felony if the penalty provided includes imprisonment for any period exceeding one year; and

(v) a misdemeanor if the penalty provided includes imprisonment for any period of one year or less.

(3) Obstruction of justice is:

(a) a second degree felony if the conduct which constitutes an offense would be a capital felony or first degree felony;

(b) a third degree felony if:

(i) the conduct that constitutes an offense would be a second or third degree felony and the actor violates Subsection (1)(b), (c), (d), (e), or (f);

(ii) the conduct that constitutes an offense would be any offense other than a capital or first degree felony and the actor violates Subsection (1)(a);

(iii) the obstruction of justice is presented or committed before a court of law; or

(iv) a violation of Subsection (1)(h); or

(c) a class A misdemeanor for any violation of this section that is not enumerated under Subsection (3)(a) or (b).

(4) It is not a defense that the actor was unaware of the level of penalty for the conduct constituting an offense.

(5) Subsection (1)(e) does not apply to harboring a youth offender, which is governed by Section 62A-7-402.

(6) Subsection (1)(b) does not apply to:

(a) tampering with a juror, which is governed by Section 76-8-508.5;

(b) influencing, impeding, or retaliating against a judge or member of the Board of Pardons and Parole, which is governed by Section 76-8-316;

(c) tampering with a witness or soliciting or receiving a bribe, which is governed by Section 76-8-508;

(d) retaliation against a witness, victim, or informant, which is governed by Section 76-8-508.3; or

(e) extortion or bribery to dismiss a criminal proceeding, which is governed by Section 76-8-509.

(7) Notwithstanding Subsection (1), (2), or (3), an actor commits a third degree felony if the actor harbors or conceals an offender who has escaped from official custody as defined in Section 76-8-309.

Utah R. Evid. 106

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

Addendum B

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 111903659 FS
	:	
Plaintiff,	:	Appellate Court Case No. 20140749
	:	
v	:	Volume III of IV
	:	
JAMES RAPHAEL SANCHEZ,	:	
	:	
Defendant.	:	With Keyword Index

JURY TRIAL MAY 19, 20, **21**, & 22, 2014

BEFORE

THE HONORABLE DENISE P. LINDBERG

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

in the middle of his testimony. I was (inaudible).

THE COURT: All right. That'd be fine.

CHAD REYES

Having first been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. BOEHM:

Q Thank you for being here. Would you tell the jury your name, please?

A It's Chad Reyes, last name is spelled R-E-Y-E-S.

Q And what do you do for a living?

A I work for the Unified Police Department.

Q How long have you worked in law enforcement?

A Approximately 16 years.

Q And would you summarize your experience during your career in law enforcement?

A I started off in the corrections area in the jail, I worked there for about a year, moved from there into patrol, did some traffic investigation, and then I moved into the violent crimes unit, where I served as a detective for approximately eight years. From there, I was promoted to sergeant, and moved back to patrol for a short period of time until I moved into K-9, and I currently supervise the UPD's K-9 unit.

Q I think it's pretty clear that this case is about

Q These are State's Exhibit 73 and State's Exhibit 74. Could you briefly describe what is depicted in State's Exhibit 73?

A Seventy-three appears to be Mr. Sanchez's right hand, a photograph of his right hand that was taken at the hospital at St. Mark's that day.

Q And what is in State's Exhibit 74?

A Seventy-four is a photograph taken at the hospital that day of his left hand.

Q And do those photographs accurately depict what you saw when you saw the defendant there in the hospital?

A They do.

MR. BOEHM: We would move to admit State's Exhibit 70 - is it 73 and 74?

WITNESS: Yeah, 73, 74.

MR. BOEHM: State's 73, State's 74 that -

MR. DELLAPIANA: No objection.

THE COURT: They'll be received.

(Plaintiff's Exhibits 73 and 74 received)

Q (BY MR. BOEHM) When you get to the hospital, do you immediately begin to speak to the defendant, or what do you do?

A No, I waited for some time before I spoke to the defendant, waited for hospital staff to offer a treatment, further evaluate him, and I let them take care of him,

basically, before I tried to speak with him at all.

Q Okay. When did you begin to speak with him?

A After he'd been assessed by the physicians and the nurses, and I conferred a little bit with them, and then determined that we were at a point where I could attempt to interview Mr. Sanchez.

Q Most of my questions, I guess, for the remainder of your testimony, deal with that specific interview. So, if you have questions, it looks like you've got a large binder there. Please just let me know if you need to look at anything, I'll ask the judge and we'll see if it's okay if that refreshes your memory.

A Great. Thank you.

Q What address did the defendant provide to you as his home address?

A He provided 1743 East 3080 South, which is the coordinate for Gregson Avenue, so the Gregson Avenue address.

Q And so whose home is that?

A Roger Gary Warner's.

Q Did you ask him for a phone number?

A I did.

Q What did he say?

A He told me he didn't have one, that he shared a phone with Mr. Warner.

Q Did you get any other information or do anything

else before you began to question him?

A I did. As I mentioned, I spoke with the doctors, and then I also tried to assess him myself, make sure that he was of mental ability, based on all the trauma, and then his mention of the methadone that he had taken, that he was capable of talking to me; he was in a mental state he was capable of responding to my questions and having a conversation with me, a lucid conversation.

Q What kind of questions did you ask him to verify that?

A I asked him about his educational background, his date of birth, his name spelling, the current day, the current date at the time, his work history, basic questions like that.

Q In general, were his responses accurate?

A Yes.

Q Was there anything that was off?

A He mentioned to me the - May 8th - I asked him what the date was, and it was May 5th, obviously, and he told me that the date was May 8th. So, he was off by a few days.

Q Okay. But other than that, his responses were accurate?

A Correct.

Q What did you do after you went through that procedure?

A After I went through that, as part of my rapport building process, that was part of the rapport building process as well, but I typically start off my stories with just a brief analogy about truthfulness, and I offered a story similar to that to Mr. Sanchez.

Q After you'd done this analogy, what did you do?

A I offer - or I advised Mr. Sanchez of his Miranda rights.

Q And those are the same rights that we hear on any television show where someone's being advised, you know, what rights they have.

A Yes.

Q What did he say in response?

A He acknowledged that he understood each of his rights, and he agreed to speak with me without an attorney present.

Q Okay. So what did he say after that?

A I asked him what happened. I asked him to tell me what happened, and initially his responses were fairly vague. He told me that he got into a fight with Angela. I asked him to elaborate, and he told me that he slapped her, he thumped her, and then he called the cops.

Q And how did you respond?

A As I mentioned, I felt that the brief explanation that he gave me was fairly vague and lacked detail, so I

asked him to elaborate.

Q And what did he say?

A He told me that he slugged her a little bit, and that it went farther than it should have.

Q Did he say when this fight began?

A He said the night before, so last night, I believe, was - were his words.

Q Okay. And so, this interview that took place, then, we're still talking about the afternoon of May 5th.

A Correct, probably around 4:30 p.m. on the - on the 5th.

Q So, you took the term last night to mean the night of May 4th.

A Correct.

Q Did you find out more about how it began?

A Yeah, I asked him how it began. He mentioned that it started the night before, and he told me that he pulled her hair, and - he got mad at her and he pulled her hair.

Q Okay. Was there anything interesting about the statement that he had pulled her hair, in terms of the evidence that might have been located at the scene?

A Yeah, there were some strands of hair that were located in the house that were consistent with some sort of a physical assault where someone would be pulling hair from another human's head.

Q What was the length of the defendant's hair when you were (inaudible) this interview?

A The length of the defendant's hair was very short.

Q Okay. And the length of Angela Jenkins' hair?

A Was I believe around shoulder length, maybe a little longer.

Q Okay. So the finding this hair - did you say whether it was more pieces of Angela's hair being a little bit longer, or of the defendant's being much shorter?

A It was consistent with Angela's hair, and inconsistent with the defendant's.

Q What did he say after he said that he'd pulled her hair?

A He said that - I again asked him to elaborate a little bit, and he mentioned again that he pulled her hair, he slapped her, he said he choked her a little bit, and it was over from there.

Q When he said that he was choking her, you know, why is that significant in your training and experience?

A Choking is often depicted in movies and even maybe from our own experiences as something that is easily survivable, and often times when it's done in horseplay it is-

MR. DELLAPIANA: Judge, I'm going to object. This seems to be some sort of speculative, perhaps irrelevant

opinion evidence. I don't think it's relevant or necessary from this witness.

THE COURT: Your response?

MR. BOEHM: I guess I can lay a little bit more foundation. It's a very significant portion of the interview is detailing the choking and the strangling that was discussed by the defendant, and so if - I'm trying to lay the foundation that explained why -

THE COURT: Go ahead.

MR. BOEHM: - he's asking the question.

MR. DELLAPIANA: Well, Judge, if I may, I think it's fair for the officer to testify as to what statements Mr. Sanchez made to him about this. But the question was, and starting off on something that was unrelated to this case about what people see in movies or something, it's abundantly irrelevant.

THE COURT: Okay, why don't you - why don't you tailor your response to the questions that are posed?

MR. BOEHM: There we go. Fair enough.

Q (BY MR. BOEHM) Have you received training as a law enforcement officer involving strangulation?

A I have.

Q And what's the basis for that training? What's the need for that training?

A Just level of offense and level of injury that

could be associated with strangulation, so it - I guess to keep it specific, the difference between, for example, a misdemeanor type assault versus an aggravated assault, where someone might be attempt - attempting or intending to inflict serious bodily injury, choking is definitely a method that would allow serious bodily injury or even death to be inflicted.

Q So, this is something that's important to you when you're interviewing somebody.

A Yes.

Q Okay. When did he say that he choked her?

A He initially said that he only choked her a little bit right at the end of the - right at the end of the assault.

Q And I would - if we may, there's a question that you asked him, and I think it's down on page nine of your interview, it's Bates stamped Roman numeral 10.01, and a long string of zeros before the number nine. I'm looking specifically at lines 247 and 249. Would you read those to yourself?

A Okay.

Q Is it fair to say that at that point in the interview, he said that the timing of the choking was just last night?

A Yes.

Q Did you ask him anything else about that?

A I did.

Q Okay, what did you ask him?

A I asked him if she lost consciousness at all.

Q And what did he say?

A He said that she did a little bit.

Q Did he elaborate?

A I asked him to elaborate, and he said that she lost consciousness and that he attempted to revive her on a couple occasions by breathing for her.

Q Did he make any physical gestures to explain what he meant by breathing for her?

A No. In fact, I tried to get him to explain that a little bit more, and I even offered - I asked him specifically if he performed CPR or just mouth to mouth, and he just repeatedly, I think three or four times throughout the interview in different parts, said that he would breathe for her.

Q Okay. What did he claim to do after that?

A He claimed that - actually, let me - I have my chain of thought, I thought in the right order, but if you don't mind me referring to my notes here really quick?

MR. BOEHM: Is that okay, Your Honor?

THE COURT: Go ahead.

WITNESS: Thank you.

THE WITNESS: Can you repeat your question one more time?

Q (BY MR. BOEHM) Yeah, and maybe, just for the jury's benefit, let's talk about this, and we'll break back into that. I apologize for jumping around. This interview that you gave, was it recorded?

A It was.

Q Okay, so we - what you're looking at and referring to, what I'm looking at is a transcription of that report; is that correct?

A That's correct.

Q Okay. I guess I'd like to know, he talked about this breathing for her. What else did you know, or what else did you want to know about this fight?

A Well, I had seen Angela Jenkins prior to the interview. I initially had responded to the scene at Cherry Hill and had entered the apartment momentarily with Detective Park, so I was aware that the amount and level of injuries on Ms. Jenkins' body were not consistent with the vague responses that I was getting from Mr. Sanchez, so I asked him if he would elaborate on some of the other injuries that may have been caused.

Q Okay. And what did he say?

A I asked him specifically if he had kicked her, and he stated that he had, that he had used the heel of his foot,

and stomped on her thigh, or her hip area.

Q Okay. Anything else?

A I asked him if he could've kicked her anywhere else, and he indicated that maybe up towards her buttocks, and possibly on her shoulder. I asked him if he used any objects, and he stated no, just his heel. And I'm kind of jumping ahead a little bit as well, but in order to try and keep these in order, I recall asking him if he bit her anywhere, and he stated that he had bit her on her arm, and I asked him if he bit her anywhere else, and he said he might have, but he can't remember.

Q So, he indicated that he used his feet and his mouth. Did he ever use his hands or his arms, or anything like that?

A He did. After he mentioned those injuries to me, I asked him specifically about some injuries that I saw on her stomach and her torso, as Dr. Reese had described, they were small, oval injuries and so I asked him about those, and he explained to me that he had grabbed her stomach, and was clenching or pinching and pulling on those as well.

Do you have any questions about that, or -

Q No.

A - so, in addition to those injuries, I asked him if he had done anything else to her face, and at that time he informed me that he had grabbed her lip with his hands and

pulled them down and to the side, which - which caused the tearing and so forth in her mouth.

Q Was there anything that he said about just the general injuries to the face? The diffuse swelling that's been described, did he describe how that could've occurred?

A Yeah, I asked him if he ever punched her. He had already mentioned that he thumped her and he slugged her, those were his words that he used, and I asked him if he hit her with a closed fist, he admitted that he had once, but then said that he repeatedly slapped her back and forth. I asked again, because of the extreme amount of swelling and congestion and bruising that was present on Ms. Jenkins' face, I asked him how he continued to injure her face, and how her nose and mouth became so bloody, and he told me that he had backhanded her.

Q And did he say how often?

A He just said repeatedly. He said that he slapped her several times forward and backwards, I believe is how he described the slapping, and then when I asked him specifically about the nose, he said he backhanded her.

Q Was there any explanation - and it sounds like you said something about using one hand; is that correct?

A Yes.

Q Was there any explanation for why he wasn't using the other hand?

A While I was at the hospital, I observed him receive treatment for a splint and a cast for his right hand, the pinky area, and I asked him about that, and indicated to him - I indicated to him that his pinky knuckle on his right hand was fractured, and he told me that it has, and that's how I asked him about the punching, and when he admitted that he had punched Angela at least one time, but he claimed that the fracture in his hand occurred when he punched the wall, not when he punched Angela.

Q How long did he say that this fight went on for?

A He said probably a couple hours.

Q And without going into anything that Angela might've said, was she making any - were there any reactions? Where there any signs of distress that he told you about?

A Yeah, I asked him specifically about the choking, and I asked if Angela was saying anything or reacting at all to him when he was choking her and he said that she wasn't saying much, she was just screaming.

Q What did he say - or, I guess, when he talked about this again, or when - let me back up. So he said that the fight lasted probably for a couple of hours?

A Yes.

Q Did he say a time when it began?

A He said it began last - last night, again, and then he estimated that it ended about eight or nine in the

morning.

Q Okay. So, the issue of a couple of hours didn't match up, necessarily, with the time frame that he's giving you.

A With his own statements, no.

Q Okay. What did he say that he did - or what happened - did he say anything more about what happened when he choked her?

A Yeah, I asked him at one point if she was fighting back at all, and he stated that, a little bit, were his words, but not much because she's a woman. I also asked him if - as I mentioned previously, if she lost consciousness at all when he was choking her or during the assault, and he said that she had, as I mentioned, and that he attempted to revive her and - by breathing for her, and also by taking her to a bath - to the bathtub, where he ran water over her head, or he put her head under the water, he told me.

Q Okay. And, a moment or two ago I asked you when it ended, and you said something about eight or nine. When was this eight or nine, the end of this fight, in relation to this issue with her consciousness?

A At eight or nine is when - my interpretation of the interview with Mr. Sanchez was that Ms. Jenkins lost consciousness at least a little bit several times throughout the assault. At eight or nine, it was my understanding from

Mr. Sanchez that Ms. Jenkins lost consciousness finally and was never able to be awakened again.

Q What did he claim that she did - or what did he claim to have done himself after she lost consciousness at about eight or nine?

A At eight or nine, he said that when she lost consciousness, he lied down with her and took a nap.

Q How long did he say he stayed asleep?

A Approximately an hour, is what I would assume. I don't remember if he - I don't remember if I asked him that specific question, or if he gave me a time frame, but he said he fell asleep for - or he laid down with her at eight or nine, and then he called the cops after he woke up, which would've been an hour or two later, depending on when that was.

Q And did he mention at all whether he had called Gary before or after he called the police?

A Yeah, he said after he woke up and could no longer arouse her or awaken her, he called Gary Warner and then called the police after that.

Q And what did he do after that?

A He left the apartment, indicated that he left the apartment because he was scared.

Q Did he say why he was scared?

A I don't believe he gave me an exact reason why,

other than he couldn't wake Angela up.

Q Could I direct your attention to page 13 of your interview on line 346? It's ending - Bates stamp number - Roman numeral 10.01, string of consecutive zeros, and then the number 18?

A Yeah.

(Inaudible conversation)

Q (BY MR. BOEHM) Maybe if you would turn back one page, to page 12, and look at line 345.

A Okay.

Q And then look at 346, and see if that helps to refresh your memory. I believe the question was, why was he scared? Having looked at that, does that help to refresh your memory?

A Yeah, basically what I said, just to elaborate a little bit more, is that she wasn't waking up, she wasn't saying anything any more, and so he was scared.

Q What else did you want to find about - find out about his actions after he left the apartment?

A After he left the apartment, I was curious about the - any evidence that he may have taken with him from the apartment, so specifically clothing that he was wearing during the assault, and where - what the location of that might be.

Q Okay. And what did he say?

A He told me that he was wearing a blue button-up shirt that he had left behind in the apartment - in apartment number 18, and that he was wearing green pants that he had taken off at Gary's and left in Gary's bedroom, as well as white socks that he had taken off and left in Gary's bedroom.

Q Was there anything - were there any other items of clothing, say, a shirt or anything like that, that you asked him about?

A The shirt - the blue shirt that was left behind, the pants - the shirt was in the apartment still, that's where he claimed to have left the blue shirt that he was wearing, and then the pants and the socks were at Mr. Warner's house.

Q Did he describe what kind of shirt it was?

A He did. He said it was a blue button-up shirt, short-sleeve.

Q Did you learn anything more about James and Angela's relationship from talking to him?

A I did. I asked Mr. Sanchez approximately how long he and Ms. Jenkins had been in a relationship, and he alleged about six months; however, even from Mr. Warner's own statement, and some of the other records, it appears that they were only in a relationship for about three to four months.

Q Is it possible that he might have lived with her

for a brief time before they were in a relationship?

A Yes.

MR. BOEHM: Excuse me, just one moment. I apologize.

THE COURT: Sure.

Q (BY MR. BOEHM) Where did this fight take place inside of the apartment?

A I asked Mr. Sanchez to describe that for me, and he told me in the back bedroom. Just to confirm that we were talking about the same bedroom - because it was a two-bedroom apartment - I had him provide descriptions of some of the furniture that was in there, and he mentioned the blue mattress without the sheets, and a TV and so forth, so we were - we were sure we were talking about the same bedroom.

Q And what else did you want to find out about the scene inside the bedroom?

A I asked him if he attempted to clean it up at all, because, as I mentioned, I'd been in the apartment prior to, and he mentioned that he did try to clean Angela up, and used hydrogen peroxide, and also talked about taking her to the - to the bathtub.

Q Did he say anything more about any cleaning agents like hydrogen peroxide or anything else?

A Not that I can recall. Not specifically.

Q Did he say anything about why she would need to

have her head placed under the faucet in the bathtub?

A Just that she was - I took it for - I took his intentions there for two purposes. One was because he was trying to fully arouse her or awaken her, and then also because he mentioned that she was bleeding profusely from her face - from the nose.

Q Okay, and how -

A And mouth.

Q Excuse me. Was there any more to that?

A Just nose and mouth. No.

Q Okay. Sorry to interrupt. How did her nose get so bloody?

A As I mentioned, I asked him about that specifically, and he said that he backhanded her.

Q I think - I wanted to ask you more about any of the facial injuries, but correct me if I'm wrong, you've already talked about this issue of pulling on the lips.

A Yeah, I'd asked him, because of the - the lip injury was so - so severe, I asked him about that specifically, and he told me that he grabbed her lips, or stuck his hands in her mouth, and pulled down and to the side.

Q According to the defendant, did Angela ever leave the bedroom?

A Yes. Just on that one occasion where he assisted

her to the bathroom or the bathtub, and tried to get her a little bit more alert by running her head under the water.

Q Okay. How did your questioning of the defendant conclude?

A Well, as I mentioned, even throughout, as I asked specific questions to him, I had to - I had to try to - his questions and responses were always very vague. And so, I asked him at the end about how Angela ultimately lost consciousness for the last time, and asked him about his specific method of choking her. He mentioned to me that he - as I talked about, at the very beginning of the interview, he says he used his hands only, and then as I questioned him a little bit further, I asked him if he used anything else to choke her. He told me that he got her in a headlock at one point, similar to a headlock, and that while he was doing that, it wasn't really having much effect, and so at the very end, with Angela lying on her back, and on the floor, he got on top of her and placed his elbow in her throat, and that wasn't having much effect either, so he used his forearm and leaned into her as she was lying on her back on the floor. After he did that, I asked him if she blacked out, and he said yes, that was the time that she blacked out, and she never regained consciousness from that point forward.

Q Was he clear about where her body was positioned?

A I don't believe I had him describe exactly where in

the room, but it was clear that she was in the bedroom on the floor, face up, so on her back.

Q Okay. And, did he describe where he placed his forearm?

A He placed it across the front of her neck. So, I asked him specifically just, you know, on the front of her neck, while she's laying on her back, and you used your elbow and then your forearm, and he agreed that that was how he had finally caused her to lose consciousness for the last time.

Q Before she lost consciousness, though, did she respond in any way?

A No. He said that she blacked out and she didn't say anything at all.

Q What was his response?

A He said that he - after that, he laid down with her and I think that's when he said that he laid down with her and, after he woke up he was scared because she wasn't saying anything anymore, and so he called Mr. Warner and then called the police.

Q But he was aware before he took this nap that she had lost consciousness.

A Yes. I asked him if he was ever able to arouse her or awaken her again after that last moment, and he - I asked him when that was, when - approximately what time it was that he used his forearm to chcke her, and he said that was about

eight or 9:00 in the morning that day.

MR. BOEHM: If I could have one moment, Your Honor?

THE COURT: Yes.

MR. BOEHM: I guess I have one last exhibit. This is marked State's Exhibit 78. May I approach?

THE COURT: You may.

Q (BY MR. BOEHM) Are you familiar with what that exhibit, State's Exhibit 78, contains?

A I am.

Q Is that an accurate depiction of what - well, tell us what that is, briefly.

A It's a driver's license photo of Ms. Jenkins.

Q And is that an accurate reproduction of the photo which you may have reviewed when you were investigating this case?

A Yes.

MR. BOEHM: We'd move to admit State's Exhibit 78 into evidence.

THE COURT: State's 78 will be received.

(Plaintiff's Exhibit 78 received)

MR. BOEHM: Your Honor, I just want to make sure. Was there any objection on 78?

MR. DELLAPIANA: No.

MR. BOEHM: Your Honor, that's - concludes my questioning of this witness at this time.

CROSS EXAMINATION

BY MR. DELLAPIANA:

Q Good afternoon, Detective.

A Afternoon.

Q I'm just going to go through your earlier testimony more or less in the order that you talked about things, or according to my notes, and ask some questions for clarification, to get a little bit more detail.

A Sure.

Q I think one of the first things you talked about was how you got involved in the case, and that is because you got notified of 9-1-1 calls to the Cherry Hills apartments.

A Correct.

Q All right. And eventually you learned that James Sanchez had made those calls.

A Yes.

Q First one from inside the apartment number 18?

A Yes.

Q And then a second one after looking at the video from the 7-Eleven, the second one from the 7-Eleven?

A Correct.

Q Okay. By the way, is it - is it correct that from the front of the Cherry Hill apartments, you can actually see the 7-Eleven just up the road?

A I believe so. I don't recall. I think - I think

you can.

Q Now look at Exhibit 1 - are these in order, I hope?

A No. They used to be.

(Inaudible conversation)

Q (BY MR. DELLAPIANA) Let me show you what's marked as State's Exhibit 1, and appears to show the front of the Cherry Hills apartments, and then the - up the street on the left are what looks like 7-Eleven signs. Does that appear to be the scene we're talking about?

A Yes, it is.

Q Okay. So, it is visible from the front of the -

A Yes.

Q Okay. And it'd be especially - especially note - you'd see if ambulances were on the street in front of the house.

A Yes.

Q Okay. You've indicated that there was clearly once you - well, let me say it. First you - soon, following your investigation, you went over to the house that was known as Roger Gary Warner's house, right?

A Yes.

Q And there was some delay in the having response from the occupants.

A Yes.

Q Now, eventually you said James Sanchez came out.

Let me ask you a question about that. Wasn't it fair to say that at the time the came out, he was in some kind of a drug induced stupor? Like -

A I don't know that I'd say he was in a stupor. I assisted in contacting Mr. Sanchez when he came out of the house, and he did alert us fairly quickly that he had - I believe even before we - even before he exited the house, he mentioned to negotiators that he had ingested - I think he said 17 methadone pills that he had taken from the victim.

Q Well, but he was lethargic, mumbling, clearly under the influence of some kind of a -

A He - he - I can say that he - he didn't have any pants on, he was obviously - he - it was an unusual day for him, I'll say that. I can't - I can't say that he appeared - I honestly can't say that he appeared lethargic. I mean, he communicated with us. Once he was in the ambulance, he did start to appear lethargic then, when he was laying on the stretcher and so forth.

Q All right.

A But he was able to walk out of the house on his own.

Q Okay. All right, fair enough. And then you - because he was starting to exhibit these symptoms, you did take him to the hospital.

A Yes.

Q This is a little bit out of order of what I was going to ask you, but how long was it between when you took him to the hospital and when you started to interview him?

A We arrived at the hospital at 3:43, I believe, according to the dispatch notes, and I - I can't say exactly what time I started to interview him, I would guess at approximately an hour after we arrived.

Q And that was after he was treated with Narcone?

A Narcan, Yes, sir.

Q Narcan? All right. There was - you gave some testimony about - I'll try not to misrepresent it, but that you thought that Roger Gary Warner was planning some sort of a getaway plan or something, for -

A That's what Mr. Warner indicated to me, yes.

Q Let me - isn't it - let me get to the rest of the story. Didn't he - didn't he tell you that the plan was to let - his plan was to let James Sanchez get something to eat and sleep a while and take his insulin, and then turn himself in after that?

A He -

Q Does that sound familiar?

A It does. I think turn himself in was one of the options. I think Mr. Warner's intent was just to lead us away, and whether that was to buy time for James to eat or to sleep, or possibly even to escape, I don't know that Mr.

Warner even knew what the result of that would be. He just intended to lead us away.

MR. HAMILTON: Well, can I approach?

THE WITNESS: Sure.

THE COURT: You may.

Q (BY MR. DELLAPIANA) Go ahead and look at this, and see if it's recognized as an interview between Gary Warner and you, and read to yourself this section here, and see if that refreshes your recollection.

A Okay.

Q So fair to say, he, at least at this point of the interview, told you his plan was to try to give James some time to eat, sleep, take his insulin, the idea he was going to turn himself in later?

A Yeah. What this does to me, and what it reminds me of, is that Gary intended to lead us away - lead us away from the home, meaning that James would be there by himself and then Gary would give - make a deal with us later, is the word that he used, and talk James into meeting Gary at his work and then James and Gary would turn himself in.

Q Okay.

A So, that made me believe that it would allow James time to leave the house.

Q Oh, I - I know you - I know you've asserted that that's what you thought might be possibly happening, I'm just

looking at the words there, and it says the plan was to let him eat, sleep, take some insulin, and then would plan to turn himself in.

A And then to meet Gary at Gary's work to turn himself in.

Q Thank you. Let's see, one of the exhibits that you identified when you were, I think waiting to talk to James at the hospital, or maybe (inaudible), maybe it was right after you started to interview him. By the way, in that interview, once he came to his senses, is it fair to say he was cooperative with the interview?

A Yes, very much so.

Q All right. There is an exhibit, I think two exhibits, 73 and 74, that show pictures of James' hands, clearly with some abrasions on his - on one or both of the hands. Do you remember that exhibit?

A I do. Yes.

Q And, is it - isn't it correct that when you ask him about his hands, and the broken - the one that was broken, was that he told you that that was from hitting the wall.

A Yes, he did.

Q Okay. Just wanted to make that clear. Thank you. You also asked him some questions about whether he was trying to clean up the apartment at some point. Just some general questions about cleaning.

A Yes.

Q Just to kind of focus your attention on what I'm going to ask about. And just for clarification, the - when he was talking about the taking some - I mean, you asked him if - you remember taking some peroxide and some first aid stuff to try cleaning up? Do you remember asking him that question?

A I do.

Q All right. And he's - and you're asking, was that before or after she lost consciousness, and he says that was before?

A That could've been. I honestly don't remember. If you - if I can refer to my -

Q Yeah, sure. Look at page -

A - transcript, what page is that?

Q - 20 of the interview -

A Page 20?

Q Yeah, X.1.00020.

A Okay.

Q At maybe line 551.

A Okay.

Q So, is it - that was before she lost consciousness?

A Yes.

Q Okay. And he was trying to - and you had elicited the test - you testified about his admission that he had

backhanded her, and that's what made her nose bleed, do you remember that?

A Correct, yes.

Q And that he was trying to - trying to get - trying to slow the blood, or stop the blood, but it kept running?

A Yes.

Q All right. Okay. I think you were pretty clear about this, let me go ahead and ask you anyway. You testified that James had admitted beating Angela and hurting her in a number of ways, hitting, kicking, and choking. It's correct, however, that when you asked him if he used any weapons, that he said that he did not.

A Yes.

Q Okay. Okay. Let's see. Oh. One of the things that you asked James about was whether - what Angela was saying to him during this assault, and I'm pretty sure that your answer was - and tell me if I got it wrong, that he said she wasn't saying much, she was just screaming.

A That sounds right.

Q All right. It sounds right, but it's not entirely true, is it?

A That's what he told me.

Q Okay. Well, let's look at the - let's look at the interview again. Let me direct you to page 8.

A Okay.

Q And just look at page 8 for a minute, go ahead and read down there a little ways, it's double spaced, so it shouldn't take long.

A I don't see on this page where I asked James what she was saying. Is there a line that you're referencing?

Q No, I'm just - I want to make sure we're looking at the same page. Yeah. No, I don't - I mean, I'm just saying, you testified that that's what he answered. And now I'm going to direct your attention to some details here about what he said she said, other than what you said he said she said.

A Okay.

Q And you said, she didn't say much, she's just screaming. In fact -

MR. BOEHM: The State -

THE COURT: Counsel?

MR. BOEHM: - would like to raise an objection at this moment, Your Honor. He's indicated that he intends to ask statements that this alleged victim, Angela Jenkins, made. Those are clearly hearsay, and we would object on that basis.

MR. DELLAPIANA: Your Honor, I would like to confront this witness, who has misrepresented the facts of the case, and this cross examination will expose his bias and his omission of critical facts.

THE COURT: Counsel, approach.

(Whereupon a sidebar was held as follows:)

MR. BOEHM: Page 8 is the statements that (inaudible) to his opening statement, apparently trying to elicit testimony with this witness regarding statements (inaudible) talked about regarding (inaudible).

MR. DELLAPIANA: As we always do when we cross examine somebody about what they testified about, that's -

MR. BOEHM: The State, in its direct examination of this witness paid very careful attention to that transcript, and I went through it in fine detail about if any statement (inaudible).

MR. DELLAPIANA: Nope.

MR. BOEHM: Their - the (inaudible) that defense counsel's talking about, she didn't say much, comes from a much later page, I think it's 24 or 25, something that was discussed. And she said - he asked - he asked something about what she was saying (inaudible), she didn't say anything (inaudible).

MR. DELLAPIANA: So they elicited that testimony. That is not a complete, accurate statement.

MR. BOEHM: We didn't introduce any statement of (inaudible). Screaming is not a statement.

MR. DELLAPIANA: You asked if she had said anything, and he said no.

MR. BOEHM: I don't think what was said - what did she say?

THE COURT: No, the question was - came in, when you were strangling her, did - it was in that context that the question was posed. Not, did she say anything at any time? If you had -

MR. DELLAPIANA: Well, that's the - but that's the (inaudible) impression -

THE COURT: If you're seeking to introduce -

MR. DELLAPIANA: Uh-huh (affirmative).

THE COURT: - hearsay, unless you can give me an exception, it's not coming in.

MR. DELLAPIANA: Well -

THE COURT: It's not coming in.

MR. DELLAPIANA: The confrontation clause.

THE COURT: The confrontation clause has - you're not eliciting statements of any individual that is accusing him of anything at this point - you're introducing the statements of somebody else, and that what you're seeking to do. They're not his statements. You can confront him about his own statements. As I understand the confrontation clause, eliciting somebody else's statements is not part of it.

MR. DELLAPIANA: Well, he's misrepresenting what she said.

THE COURT: Okay -

MR. BOEHM: He didn't - I can voir dire the witness and we can direct (inaudible). We can even recall him from (inaudible). We never introduced a statement of Angela Jenkins (inaudible).

MR. DELLAPIANA: I've got some other things while we're standing here. I'm convinced that the right to cross examine is more than adequate for this situation, but Rule 106, the completeness rule, when a party introduces part of a recorded statement - this was a recorded statement -

THE COURT: I do (inaudible), the completeness rule speaks to completing that statement, where only a fragment of the statement is brought in, not to bring in something that is pages away from the statement that -

MR. DELLAPIANA: Well, I disagree.

THE COURT: - was allegedly brought in. So -

MR. DELLAPIANA: I disagree.

THE COURT: - as I see the completeness rule is, if you're asking someone to read a fraction of a statement, and that statement on its own or that - without introducing the complete - that whole complete statement, it leaves a misleading indication, then the completeness rule applies. But, to seek -

MR. DELLAPIANA: Well, I - that's where we are.

THE COURT: No, we're talking about something that

you're telling him is page - something arising on page 8. This statement - the statement you were referencing is, I'm being told is on page 24. I don't know, I don't have those in front of me. But, based on that, I don't believe that the completeness rule applies.

MR. DELLAPIANA: Well...

THE COURT: So, if that's your basis -

MR. DELLAPIANA: Well, I'm going to ask the question in a different way.

THE COURT: Well -

MR. DELLAPIANA: If he wants to -

THE COURT: - you better clear it through me.

MR. BOEHM: Yeah, I would ask for that (inaudible) that he can't just (inaudible).

THE COURT: Yeah. No. I don't - I don't want this tainting the jury. You tell me what it is that you're going to ask.

MR. DELLAPIANA: Okay. Well, I'm going to ask a question regarding Mr. Sanchez's explanation for the - for the assault.

THE COURT: Then -

MR. BOEHM: (Inaudible) -

MR. DELLAPIANA: This is something that goes to his own statement. Regardless of the truth of whether - of anything she said, he believed -

THE COURT: Then it doesn't - but it's not a statement against the party. It's his own statement that is arguably self serving.

MR. DELLAPIANA: Well, that's for the jury to -

THE COURT: If he wants to take the stand and say it, then that's fine. But -

MR. DELLAPIANA: Well, tell you what, we can spend the rest of the afternoon with me cross examining this guy on the record and send it up on appeal then, because that's the defense. That's our defense.

MR. BOEHM: I mean, we filed a motion in limine that was - talked about the 412, we talked about this yesterday, everybody knew that this was going to be a tactic that might be employed, but I think that everybody has to recognize that either one doesn't allow the statement unless it's offered against (inaudible), defense counsel represents the defendant (inaudible) cannot ask this witness -

MR. DELLAPIANA: I think we used that argument.

THE COURT: Yes, you did.

MR. DELLAPIANA: I'm - (inaudible), I specifically said, I am not using a party opponent language rule as a way to introduce a statement of my client. I -

THE COURT: That's true, what you said is that you would elicit it through somebody else's testimony. And what I said to you is, if you're seeking to introduce it through

somebody else, it needs to be consistent with the rules of evidence, and it cannot be a statement of the individual. I said - and I also said that if you, you know, clearly he has the right to testify, he clearly has a right not to testify. But, if he - if you want to put that in, you're not eliciting it on the basis of hearsay.

MR. DELLAPIANA: Well, tell you what, Your Honor. I will attempt to ask some different questions about different things, and then when I'm done with what is hopefully unobjectionable testimony, I'll either - I'll bring it to everybody's attention that I'm ready to make -

THE COURT: We will discuss this off the record with the jury - out of the presence -

MR. DELLAPIANA: Yeah. Okay.

THE COURT: - of -

MR. BOEHM: Well, and my concern is that - I mean, the Court's asking what he - what defense counsel intends to ask, because defense counsel seems unfortunately opposed to the Court's ruling, and I think -

MR. DELLAPIANA: True. Anyway, go ahead.

MR. BOEHM: Right? And I think the issue is, there's a very big difference between what (inaudible) yesterday when the State asked a question and got an unexpected response, it was not elicited by the State's question. And defense counsel thinks he's going to say,

Well, what did defendant say about this? (Inaudible) say about this, and explain that it - the cat's out of the bag, and he's done it intentionally, and knowing that it's not admissible, that it's hearsay and that it can't be used. So I would ask for a warning that he not do that.

THE COURT: Don't tempt me, Mr. Dellapiana.

MR. DELLAPIANA: I can't - I'll tell you - I'm going to do my best -

THE COURT: Your responsibility is - you need to - your responsibility is to put in, if you wish to put in evidence that would support a - by a preponderance of the evidence a standard that you've (inaudible) on some basis.

MR. DELLAPIANA: Sure.

THE COURT: Admissible evidence.

MR. DELLAPIANA: Right.

THE COURT: But, you're not going to be introducing or leading into something that would be objectionable statements.

MR. DELLAPIANA: We'll see.

THE COURT: Just to get that on the record -

MR. DELLAPIANA: I will try.

THE COURT: - that will not happen.

MR. DELLAPIANA: I will try not to do that.

THE COURT: No. No. You will not do that.

MR. DELLAPIANA: I may end up the afternoon with my

client in custody, but not on trial.

(End of sidebar)

MR. BOEHM: Your Honor, can we just make a finding that the State has objected based on the hearsay and hear what the Court's ruling on that -

THE COURT: The State has objected; I have sustained the objection.

MR. BOEHM: Thank you, Your Honor.

Q (BY MR. DELLAPIANA) Okay. This cross examination may be shorter than I intended.

The length of the fight - you asked him about how long the fight went on.

A I did.

Q And he said it was for a couple of hours.

A Yes.

Q You described it as last - him saying another time it was last night. Do you remember that?

A I do.

Q Okay, is that fair to - for most people that can mean sometime before dawn? I mean, we refer to - oh, it happened last night, could be in the middle of the night.

A I - I would assume so. Yeah.

Q All right. You asked him about - he told you that he had choked her and that she kind of lost consciousness, right?

A He said a little bit. I think those were his words, yeah.

Q In any case, he - when it looked like she was losing consciousness, he would breathe for her.

A Yes.

Q Okay. Like, did you get that as some kind of attempt at CPR or -

A I asked him specifically, because I was confused myself, and he just repeated that he breathed for her. I asked him if he performed CPR, meaning chest compressions, and he said, no, just - he just breathed for her. So I said, mouth to mouth? And he nodded his head or something like that, I can't remember.

Q Okay. All right. Good. Let me ask you about the - the last time - you gave some testimony about the last time she lost consciousness.

A Yes.

Q And he said, this - I think you said - testified that he said it was something around eight or nine o'clock in the morning?

A That's what he told me, yes.

Q All right. And that it was - and that was after she took the pills, that's when it started. Remember that?

A I remember him telling me that she took some pills, and I think that was at the beginning of the interview,

towards the - towards the first part, I asked - the first time I asked him if he - if she lost consciousness, he said she took some methadone, and then she lost consciousness, was in that same area of the interview.

Q Right, and there were - then they were laying down, and - and do you want to look at page 9, just in case you want to see what I'm looking at?

A Okay.

Q You said, did she ever pass out and lose consciousness, and that's at line 250, right?

A Yes.

Q And he says, Well, she took a lot of pills, though, too. After she took the pills, then it started." Got that?

A He said, "a little bit, and then - "well, she took a lot of pills, too. After she took the pills, it started." Yes.

Q Then it started. Okay. And we're laying there, and she -

MR. BOEHM: Your Honor, I'm going to object again. I think that what he's trying to do again is use hearsay that's inappropriate, coming from -

MR. DELLAPIANA: Hearsay?

MR. BOEHM: - the lips of his own client, subject to 801, it's not being used against the party opponent, and so it's inadmissible.

MR. DELLAPIANA: This provides context for the direct examination.

THE COURT: Counsel, please approach again.

(Whereupon a sidebar was held as follows:

THE COURT: What are we talking about now?

MR. BOEHM: What - I'm not sure he's - I don't want (inaudible), but -

MR. DELLAPIANA: Page (inaudible)?

THE COURT: What -

MR. DELLAPIANA: He talked about the last time that she lost consciousness was when he choked her. Here, in the interview, it says the last time she lost consciousness was after she took the pills.

MR. BOEHM: And that's -

MR. DELLAPIANA: And they went to sleep, but then he woke up, he realized she was non-responsive, and he called the police.

MR. BOEHM: Okay -

MR. DELLAPIANA: That was totally misrepresented.

MR. BOEHM: This already came in on direct, so I don't know (inaudible) statement, and so I think (inaudible) did he lay down with her? Yeah, that's what he told me, (inaudible) gets three or four more questions about what his client said, I think (inaudible).

MR. DELLAPIANA: He's the one that's asked -

elicited evidence about what my client said.

MR. BOEHM: We don't need (inaudible) -

MR. DELLAPIANA: And we have to have -

THE COURT: Please -

MR. DELLAPIANA: - the context of -

THE COURT: - keep -

MR. DELLAPIANA: - leaving important things out.

MR. BOEHM: We've already elicited the testimony that your client laid down with her after she lost consciousness. I mean (inaudible) -

MR. DELLAPIANA: And you don't want me to ask any questions about it.

MR. BOEHM: It's the statements that I'm concerned about.

THE COURT: No, you can't.

MR. DELLAPIANA: Okay, whatever you say, I'll attempt-

MR. BOEHM: You can clarify that by saying that, during direct examination you testified that my client said he laid down, is that correct? Yes. I mean, you're trying to get (inaudible) the statements of your client.

MR. DELLAPIANA: Explain - get the rest of the context of what he said, other than the little bit that he -

THE COURT: Okay, and you want - and your question, what is the question you want to pose?

MR. DELLAPIANA: Isn't it true that he said it was after that she took the pills, is when she lost consciousness?

THE COURT: I thought you already did ask that.

MR. DELLAPIANA: I asked that, and what was it that he said? Well, then I was going to say, and then they laid down, and then he woke up, and she - he found her non-responsive, and then he called the police.

THE COURT: I will allow that.

MR. DELLAPIANA: (inaudible) question.

MR. BOEHM: Fair enough.

THE COURT: That's fine.

(End of sidebar)

MR. DELLAPIANA: Well, if we keep doing it like this, maybe it will take a long time. But -

MR. BOEHM: The State would withdraw its objection.

THE COURT: Thank you.

Q (BY MR. DELLAPIANA) So, I was asking about what you testified about on direct examination, about Angela losing consciousness, and we just had got through the part where you actually read the - from the transcript, and just because we were interrupted, and I want to get back to where we were, she said, after - he said, "After she took the pills, then it started," right?

A Yes.

Q After - okay. And, we were laying, and she kind of wasn't breathing, right, or wasn't responding to me, right?

A Yes.

Q And I was all - "when I woke up, that's all I remember," right?

A Yes.

Q "So I called the cops."

A Yes.

Q After the - you had two interviews with him, right?

A I had one and then we took a break and then we continued the same one.

Q Oh, same one. Okay. In between the break, or after the break, you asked him if he wanted to ask any questions?

A Yes.

Q He asked you, in effect, is she okay? Did she make it?

A Yes.

Q And you obviously told him that she had not.

A Right.

Q And, fair to say that he took that pretty hard.

A What do you mean by -

MR. BOEHM: Objection, calls for speculation. Also calls for, again, probably a statement by the defendant.

THE COURT: I think it is a bit speculative. Why

don't you -

MR. DELLAPIANA: Be more specific?

THE COURT: Just - no, just as to whatever physical reaction Mr. Sanchez may have demonstrated.

Q (BY MR. DELLAPIANA) Physical reaction, I don't know. I mean, did he appear to you to be suicidal?

A Physically? I don't know how you assess that. I mean, for someone that's suicidal, I don't know how you physically assess that unless they're committing acts.

Q Well, he asked you to shoot him, would that be evidence that he's -

MR. BOEHM: Again, objection, this is hearsay.

THE COURT: Sustained.

MR. BOEHM: Move to strike.

THE COURT: It will be stricken.

(Inaudible conversation)

THE COURT: Counsel, please approach.

(Whereupon a sidebar was held as follows:

THE COURT: I believe I may have limited Mr. Dellapiana in that - in that last interchange a little bit more than I had intended to. I narrowed it to physical response. I think I would allow any description of emotional response that the defendant may have displayed. But I'm not going to allow the State - or specific statements (inaudible).

MR. BOEHM: And I think that's fine.

MR. DELLAPIANA: (Inaudible).

THE COURT: Okay, so you're welcome to pursue that, if you wish. Because you're (inaudible) question was -

MR. DELLAPIANA: Okay.

THE COURT: - (inaudible).

(End of sidebar)

Q (BY MR. DELLAPIANA) Let me jump back to where we were a minute ago when I was asking you about James' response to your informing him that Angela had passed away, and I - and I said, fair to say he took it pretty hard, and what was your answer, or what is your answer to that?

A He did appear distraught.

Q Okay.

A He appeared distraught after I told him that, yes.

Q All right. Fair enough. I want to ask you about something like totally unrelated to the interview of James Sanchez, and it's something that is related to your interview of Roger Gary Warner, which is in section 3, around about page 17. If you want to switch -

A I'm going to have to - yeah, open this book up here. I'm sorry, what page, sir?

Q Seventeen.

A Okay.

Q And you were here and saw me asking questions of

Mr. Warner about how - what the emotional state of James was when James called Gary to come and get him, and you remember, I asked - and Gary didn't remember, and I said, Gary, do you remember being interviewed by Detective Reyes, and he said, yeah, I remember that. And then I said, do you remember telling Detective Reyes that James was crying? And he says -

A I do remember your questions, sir.

Q - and he says, this was three years ago, I don't remember if I said that. Is that what he told you three years ago? That James was crying?

A Yes.

Q And you - I mean, this interview, this was written like - this was done within hours of - a couple hours of the arrest, right?

A This is actually a transcript of a recording, so it's not a report, so it is word for word from a recording, yes.

Q All right. And the recording was made -

A Made at the time of the interview.

Q All right, which was, itself, within an hour or two of the arrest.

A Yes.

Q Very well.

If I can have just a minute, Judge?

THE COURT: Certainly.

MR. DELLAPIANA: Your Honor, I don't have any further questions for - let me put it this way, I have some further questions for Detective Reyes, but I'm not going to ask them at this time.

THE COURT: Fair enough.

MR. DELLAPIANA: And suggest we have a recess.

THE COURT: Fair enough.

Do we have redirect?

MR. BOEHM: Yes, Your Honor.

THE COURT: Okay. You may proceed.

REDIRECT EXAMINATION

BY MR. BOEHM:

Q There's a couple of, I guess we could call them housecleaning issues, and then I'll just ask you a couple of questions about what you've been asked. You saw when Derrick Cutler testified, and he talked about a match, but there was, you know, multiple sources on a pillow. The jury has seen pictures of -

MR. DELLAPIANA: Judge, I'm going to object. This seems well beyond the scope of my cross examination. Matches on a pillow?

MR. BOEHM: And this is just for clarification, and if-

MR. DELLAPIANA: Of what?

MR. BOEHM: Okay. Fair enough.

THE COURT: No. Sustained.

Q (BY MR. BOEHM) Defense asked you about the phone calls, the 9-1-1 calls. Did the defendant admit to you during his interview that he made those phone calls?

A Yes.

Q When the defendant suggested to you that he was cleaning her up to render her physical aid, what portion of the interview was that in?

A I believe it was right about the center. I can't be sure without referring back.

Q Okay. Defendant - or defense counsel asked you about Narcan. What is Narcan?

A It's a substance that is given to individuals who have overdosed on opiates, so heroin, methadone, those types of narcotics, and its function is to inhibit the effects of opiates, so as Dr. Reese was talking about suppressing the nervous system, suppressing respirations, and so forth, the Narcan inhibits that reaction from the opiates, and so, effectively stops an overdose.

Q And did you witness the defendant receive Narcan?

A I did.

Q And did you ask him about the effects of the Narcan on him?

A I did.

Q And what did he say?

A He said at first he thought that he was having some sort of reaction because the effects were so instantaneous, and then he started to feel better afterwards.

Q And that was before you interviewed him.

A Yes.

Q Defense counsel asked you about the loss of consciousness, and I'd like to be really clear about that. Was there more than one time in your interview with the defendant that he referred to loss of consciousness?

A Several -

Q (Inaudible) Jenkins?

A Several times.

Q And when he talked about the loss of consciousness and the - the effect of pills that Angela Jenkins had taken, what part of the interview was that?

A The very first part.

Q Okay. And so as the interview progressed, and he talked about her loss of consciousness later in the interview, did he talk about the pills any more?

A No.

Q In fact, when you got to the end of your interview, did you also talk to him about her loss of consciousness?

A And I believe that conversation - or that part of the conversation was very clear, talking about the last time she lost consciousness where she never woke up again.

Q And directly preceding her loss of consciousness, he talked about strangling her.

A Yes.

Q And that was with his forearm.

A Yes.

Q Defense counsel asked you if, during this - well, after this break, if the defendant was distraught. Was there any way for you to know what the defendant was distraught about?

A No.

Q So, he could've been distraught about his own circumstances.

A Yes.

MR. BOEHM: No further questions.

RE-CROSS EXAMINATION

BY MR. DELLAPIANA:

Q Just briefly, (inaudible) some questions here about the order of the interview. Isn't it true that you kind of jumped back and forth, and repeated questions about different things that happened? Like, the beginning and the middle and the end? I mean, you - for example, his first answer to you - you said what happened, he says, well - I won't include the whole conversation, "for some particular reason I got mad at her, I hit her, thumped her, I guess, and then I called the police."

A Yes.

Q Which kind of, I mean, covers the whole series of the - the assault, right?

A Not in the slightest. And that's why I asked him -

Q Well, I mean, it covers the time frame. Let me rephrase. It covers from the beginning to the end of the time frame in one sentence, basically.

A In, I guess, the most vague sense possible, yes.

Q Oh, it's not very specific. I mean, it's specific, I was angry, I hit her, I called the police, that's specific, right?

A I hit her, I thumped her, I called the police, is -

Q Specific, just not detailed.

A I guess it would depend on definition of thumped her. Thumped her - if thumped her meant a wide variety of different assaulting injuries, then maybe that would be specific and all encompassing.

Q Okay.

A I - I'm sorry, sir, I'm not trying to be - I just - I don't know exactly what you're - what you're meaning by, those three words are specific to the entire event.

Q They're specific, they're just not detailed. My point is that after that you went into detail and different - and repeated things over and over, and, you know, asked lots of questions, and -

A Yes.

Q All right. I mean - and some of the questions and answers were at the beginning, and some were in the middle, and some were at the end. It's not really a - yeah. Never mind. Withdraw the question. I think it's obvious.

Nothing further at this time.

THE COURT: Do the members of the jury have any questions of this witness? Okay, please write it down.

Counsel, please approach.

(Whereupon a sidebar was held as follows:

(Inaudible conversation)

THE COURT: Actually, counsel? I think that - I think what I'm going to say is that it's not (inaudible), because it goes into a question - into contact that occurred at another time, and that's not relevant to the -

(Inaudible conversation)

(End of sidebar)

THE COURT: All right. I am declining to ask that question as we all concur it's not a legally permissible question. Okay?

MR. BOEHM: The State has no further questions for this witness, Your Honor.

THE COURT: All right, thank you. You may step down.

MR. REYES: Thank you.

THE COURT: And then, it is about time for a break anyway, so we will take a recess. You're admonished, again, do not discuss the case with anyone or allow anyone to discuss it in your presence. Do not attempt to investigate anything about the case. Do not make up your mind about anything, or anything about - related to the evidence until all of the evidence has been received and the matter is turned over to you for deliberation.

Please rise for the jury.

(Whereupon the jury left the courtroom)

THE COURT: All right, you may be seated.

Mr. Dellapiana?

MR. DELLAPIANA: So, those questions are all -

THE COURT: These will all become part of the record, absolutely.

MR. DELLAPIANA: Okay. Very good.

So, I had two reasons for requesting the recess. One is that I'd like, in order to make a proffer for the record, I wanted to go ahead and ask the questions I'd anticipated asking without the jury present, just to make a record, and then we're going to need to have a little bit more time to talk about -

THE COURT: Mr. Sanchez's -

MR. DELLAPIANA: Something else.

THE COURT: - decisions.

MR. DELLAPIANA: Yes. So, if we - kind of suggesting, unless somebody wants a break right now, we'll just him (inaudible) take a break.

THE COURT: Detective Reyes, if you'll take the stand, please. And again, you're reminded you're still under oath. And this is solely for purposes of proffer.

MR. DELLAPIANA: Correct.

CROSS EXAMINATION

BY MR. DELLAPIANA:

Q All right. You had testified that James Sanchez told you that he'd gotten mad at Angela Jenkins and began to assault her; is that correct?

A Yes. Uh-huh (affirmative).

Q All right. He also told you why he'd gotten mad at her, right?

A Yes.

Q That because he thought -

MR. BOEHM: Can I object? I just want to make sure - we're just making this record so that he has a record for his appeal and for -

THE COURT: That is correct.

MR. BOEHM: Okay. Then I won't make any further objections.

THE COURT: Okay.

MR. BOEHM: Thank you.

MR. DELLAPIANA: And we should probably also note our - the reasons for the objection at this point, you want to go ahead and say why you objected to this line of questioning we're about to try to engage in?

MR. BOEHM: Right. And the State's objection was that he's trying to admit his own client's statement through this detective. Normally if you're trying to admit an out of court statement from a non-testifying witness, you have to meet some exemption of the hearsay rule. The most common that we see is under 801 when you're asking for the statement of an opponent's - or an opponent's statement. In this case, the defense counsel is asking the State's witness about his own client's testimony. It's not an opponent, and so it's a self-serving statement, and we don't believe that it fits under any rules or exemptions to the rules of hearsay. It's inadmissible, therefore, this doesn't help to complete any statements. The State was very careful in maneuvering around any statements that the defendant made regarding what the alleged victim, Angela Jenkins, might have said, or any statements that he might have said, that weren't inculpatory.

MR. DELLAPIANA: And the defense believes that these - this line of questioning is admissible under the Sixth Amendment and the defendant's right to confront and cross examine the witnesses, in particular on direct examination, the State had elicited evidence that, in the defense's

perspective, omitted facts that should be - we should be able to require in our cross examination to provide - and also the defense has cited the Rule 106, Rule of Completeness, which I believe in general provides that when one party introduces part of a statement, the other party can introduce other parts of the statement, or the whole statement even, necessary to provide context or as in otherwise - otherwise relevant to the direct - part of the statement previously offered, even if it's not in the same little part of the statement.

THE COURT: And with respect to the claim regarding the Rule of Completeness, and I'm trying to pull up that rule, since I don't seem to have my copy of the rules present - oh, there it is. I had concluded that the Rule of Completeness goes to when there is a fragment of a sentence, or a fragment of a paragraph, that is being introduced, but in fairness, to get a full context of that - of the import of that limited statement, the whole statement should be read, then that's when the Rule of Completeness applies. And it does not necessarily - I do not believe that it's implicated when we are addressing parts of an interview that are, as was represented to me, 20 or more pages apart, that that is not implicating the Rule of Completeness, as I understand it.

MR. DELLAPIANA: Defense also offered these - the content of these - defendant cross examination under Rule

803-4, it goes to the defendant's state of mind.

Let me add a little bit more explanation to that argument than we made at the brief bench conference. And that is that, as a - in regards to - I think that 803-4 in and of itself is a hearsay exception.

THE COURT: Correct.

MR. DELLAPIANA: But I also would like to offer this information under - as offering it not necessarily for the truth of the matter, in which case it's not hearsay at all, but to explain Mr. Sanchez's action. Since I didn't clearly make that argument at the bench, I'd like to give the State a chance to respond to that one before I go any further.

MR. BOEHM: I haven't looked up Rule 803, and I want to look that up before I make my response. But I would respond directly to the assertion that it's not a hearsay statement because it's not offered for the truth. Clearly he's offering that to show that the defendant believed that Ms. Jenkins had some type of affair with someone other - that would cause him to feel that way. Otherwise, he wouldn't have felt that way. So, I can't imagine how it's not being offered for the truth of the statement.

THE COURT: And I would say that under 803, parens 3, the rule provides a statement of the declarant's then existing state of mind, but not including a statement of memory or belief to prove the fact believed, which I believe

is exactly what Mr. Dellapiana's seeking to introduce it for. So, I do not believe that it falls within the then existing state of mind exception.

MR. BOEHM: I have nothing further to add.

MR. DELLAPIANA: And then, Judge, I - did you already address the (inaudible) to explain his conduct, provide context, and not necessarily for the truth of whether she was having an affair, but that that was his belief, and so that's what made him angry, what made him assault her?

THE COURT: I'm sorry, I'm not following you.

MR. DELLAPIANA: So, that was 801 - I think it's C2, that says that a statement which is not offered for the truth of the matter is not hearsay. Right? So, I'm offering - I want to offer either - want to elicit that James either just said he believed, that's what he believed, he was - that she was having an affair, and that she had, in fact, admitted it, or at least he said that she admitted it to him, and that's what made him so angry. That is it not for the truth of whether she had an - the affair or not, but to explain his subsequent conduct and -

THE COURT: Well, then I think you bring it exactly under 803-3, and it does not respond to - it's - it cannot be admissible for a statement of belief.

MR. DELLAPIANA: Well, I think it's a separate argument, and I'm offering it as a separate argument.

THE COURT: Okay, then I apologize. I'm missing your argument.

MR. DELLAPIANA: Well...

THE COURT: On the one hand, you're saying that you are not asserting it - that is non-hearsay because you're not asserting it for the truth of the matter, right? You're arguing that?

MR. DELLAPIANA: Yeah, can I just give you a series of one, two, three, four, five, six, seven, eight, nine Utah cases that give some examples of matters offered not for the truth? I mean, I think if it's - at least an important enough issue that, while we're still in trial, that we look at it.

THE COURT: Okay, let me see them.

MR. DELLAPIANA: They're these - some of these - some of them don't have a lot of details, but -

THE COURT: Has counsel seen that -

MR. DELLAPIANA: No.

THE COURT: - whatever you're providing me?

MR. DELLAPIANA: No, he's going to make a copy of it. (Inaudible) Utah cases.

(Inaudible conversation)

MR. DELLAPIANA: By the way, co-counsel's pulled up 803-3 for me, and I think I can - like to make a distinction. We'd be offering - so 803-3 says that the statement of the

declarant's state of mind, such as motive, which we're talking about, is -

THE COURT: But not including.

MR. DELLAPIANA: But not including a statement of memory or belief to prove the fact - remember, that is to prove that she had an affair, I'm not providing it to prove that she had an affair, but just to show his motive.

THE COURT: Or to prove the fact believed. Unless it relates to the validity of terms of a declarant's will.

MR. DELLAPIANA: I'm not trying to prove that she had a -

THE COURT: You're seeking to introduce it for purposes of establishing -

MR. DELLAPIANA: Motive.

THE COURT: - the declarant's belief, right?

MR. DELLAPIANA: Motive. Yeah. But the fact, remember to believe is that he had believed is that she had an affair. I'm not trying to prove that she had an affair, just that that was his belief and this is an exception under rule 803-3, goes to his motive.

MR. BOEHM: I don't read 803-3 the same way. And I think that we need to be careful that we're talking about more than one statement, and so I think it becomes that much more complex. I think, if I'm thinking of the correct part of this - this part of the interview, defense counsel wants

to get into - and this is where we initially raised the objection, he wants to get into what the alleged victim, Angela Jenkins, told his client, and what his client said in response.

Now, he wants to use that statement to show that his client believed something was true, that Angela had an affair, and he's using it in an inappropriate way, as the Court has pointed out, under 803-3, that he's trying to prove the fact remembered. He's not trying to show what his state of mind was when he was being interviewed by this detective. He's trying to show, you know, this issue of the statement, memory, or belief, to prove the fact remembered or believed. I think it's clear that it is a statement that's being offered for its truth, and that it's not being offered to show his - as it says, then existing state of mind.

MR. DELLAPIANA: If I can respond to that?

THE COURT: You may.

MR. DELLAPIANA: I think, just within the context of 803-3, I would not be allowed to try to elicit statements purportedly made by Angela Jenkins. Instead, I think I could - although I think it's admissible under either the completeness rule or the right to confront witnesses. But, under 803-3, I think I can elicit that James indicated that he'd got in a fight because he thought Angela was cheating on him with his brother Joshua. Whether it's true or not,

that's what he thought and that's his motive for assaulting her.

THE COURT: I guess what I don't see that you're addressing is the second part of 803-3, which says that, but not including a statement of memory or belief to prove the fact believed. Maybe I'm missing this, and maybe I need to go and do a little bit more research on that. But, that's what I'm focusing on, and I'm not understanding.

MR. DELLAPIANA: Well, I think the fact believed, that I'm not trying to prove, is that Angela Jenkins had an affair with his brother. I think that's - that's why I say, I don't think I can put on Angela - through this rule Angela Jenkins' statements of admitting that she had an affair. I can say that he believed it, that that fact is true, and I'm not offering to prove that it was true, just to give - just to show his motive.

THE COURT: And the second part of that question is, at which point? The - at the time that he is being interviewed? It's the then existing state of mind, at the time of the interview, isn't it? I mean, what - what he was feeling at the time? I don't know. I'm asking you to -

MR. DELLAPIANA: I don't know, I -

THE COURT: - clarify your position - your position in terms of, which period of time are we addressing? When he's in the process of being interviewed by Detective Reyes,

or when -

MR. DELLAPIANA: Well, that's when the statement is made. It's a statement of his motive.

THE COURT: So, it's then the then existing, right?

MR. DELLAPIANA: Well, then is a little vague. I mean, if it's a statement about his existing state of mind, that then existed as the assault -

THE COURT: Okay. It sounds like I better take a break -

MR. DELLAPIANA: Yeah.

THE COURT: - and go see what case law I can pull up that clarifies that point.

MR. DELLAPIANA: Right.

MR. BOEHM: I would also like to point out that -- well, I mean, I'll let the Court do what it will, and then we'll respond to that, and I'll strike my statement.

THE COURT: Well -

MR. BOEHM: Well, I just think that we're trying to mix the words around. I think that the clear way for defense to put this testimony in - and there only really two ways. Angela's deceased. So, she's one party to that. If it's true, in fact, that his brother had some type of sexual relationship, his brother can testify to that. He can also testify to what he was specifically aware of what the defendant might have known about that relationship, if he

actually believed that the defendant was aware of that, or the defendant can take the stand and say what it is that he believed at that point in time, and he can put it on that way. And I think that this rule, and all of these hearsay rules, are designed to make sure and protect the integrity of testimony, because in this case the statement again is not being offered against him, at the time that he made those statements he's obviously - there's a question of the voracity of statements, and so that's the issue here, is there's a couple of ways to clear it up, and it's not through this detective.

MR. DELLAPIANA: Well, that wasn't very clear, but his argument seems to be that it's not being offered as a statement against a party opponent. And I'm not making that argument. So disregard that.

THE COURT: Okay, so then your sole basis -

MR. DELLAPIANA: My - so far I've got them up to four, I've got another one.

THE COURT: Well, then please - I - now you've really left me confused. So why don't you make it really clear what your four bases are?

MR. DELLAPIANA: Okay.

THE COURT: And I will -

MR. DELLAPIANA: Right to confront witnesses under the Sixth Amendment, I think I can expose bias -

THE COURT: Okay -

MR. DELLAPIANA: - bias by admission of what I would characterize as a misrepresentation of statements on direct examination. Number two, Rule of Completeness. Rule 106. And I think State versus Cruz Meza - and Meza is (inaudible) regard, which I believe allows me to - this is a recorded statement, not just a statement of oral recollection, so it's directly in - applicable under Rule 106. I believe that allows me to introduce the whole of the statement or main part of it, that's brought by opposing party, relevant to the part that they talk about. Doesn't have to be the same page -

THE COURT: What's your citation?

MR. DELLAPIANA: Cruz Meza.

MR. BOEHM: I think I can give it to the Court -

MR. DELLAPIANA: I know, I got that from the State, I thought it was very helpful, it's right here.

MR. BOEHM: 76P 3D 1165.

THE COURT: Excuse me. What is it?

MR. BOEHM: 76P 3D 1165. I'm looking if I have a Utah (inaudible) -

THE COURT: Do you have a pinpoint?

MR. DELLAPIANA: Well, I just had note (inaudible).

MR. BOEHM: I -

MR. DELLAPIANA: I mean, it - actually the whole -

THE COURT: Okay.

MR. DELLAPIANA: - almost the entire thing talks about - the bulk of the opinion talks about the Rule of Completeness, so it's -

THE COURT: Okay.

MR. DELLAPIANA: - useful in that regard.

THE COURT: Well -

MR. BOEHM: Well, and I would say to the Court that I believe it's a relatively brief opinion, but in my reading of it, and my sharing it with counsel, I think it - at least reading what the court held, the Supreme Court of Utah held that the trial court acted within its discretion under the doctrine of oral completeness, in refusing to admit exculpatory portion of defendant's oral statement in which he explained why he killed the victim. And I brought that because I thought that would be the perfect case if this situation came up.

MR. DELLAPIANA: It's a perfect case for me. The reason the court had discretion in that case was because it was an oral recollection under Rule 611 -

MR. BOEHM: May I approach?

THE COURT: And it was declined, right?

MR. DELLAPIANA: And not -

THE COURT: And it was affirmed -

MR. DELLAPIANA: - Rule 106 recorded statements. That's why. The court (inaudible). It's - they said that

doesn't apply in rule 106 cases, and rule - ours is a Rule 106 case.

THE COURT: All right.

MR. DELLAPIANA: So that was number two. Number three was 803-3, I believe that the statements goes - is an exception under the hearsay rule, because it goes to the defendant's motive, which was that he thought Angela Jenkins was cheating on him with his brother, and I'm offering it to go to his motive, and not to prove whether Angela was cheating on him with his brother. That's number three.

Number - number four was 801-C-2, this isn't even hearsay, because I'm not offering it for the truth of whether Angela was cheating on his brother, I think, but to explain his conduct. And there's - I've given the Court, and I guess we gave a copy to the State, of nine cases - Utah cases where all kinds of extraordinarily prejudicial information was admitted with this exception. I mean, "Oh, I talked to him, and the neighbor said that he'd committed a murder, so - but I - so I went over there to interview him." Like a fact. Like that kind of information, under this exception.

THE COURT: That's the page you've just given me?

MR. DELLAPIANA: Yes.

THE COURT: Okay.

MR. DELLAPIANA: And then, did I say five - I think I said five. Let me just throw in there - haven't really

thought about this very much, sorry to say, but I think it goes to our right to present a defense, and this is our defense. So...

MR. BOEHM: Can I review this, just because I'll be looking at the cases while the court is, and hopefully be able to respond, I think I caught the confrontation clause, that was the first one. Pursuant to Rule 106 for the completeness of the statement, that was two. That it's not hearsay because it's not offered for truth, and therefore not subject to the rules against hearsay, not being a definition of 801, and then I think the most commonly referred to is that it falls under the exception in 803-3 for motive. Is that what the Court has?

THE COURT: And I think he's also based bias, presumably under 608 -

MR. BOEHM: Okay.

THE COURT: - C?

MR. BOEHM: All right. Thank you.

THE COURT: I'm assuming. He did not give me a specific -

MR. DELLAPIANA: I like that one. I adopt that one.

THE COURT: I don't - it's not my role to provide you legal bases for your argument, counsel.

MR. BOEHM: Your Honor, it's apparent to me that - is there anything else that the defense wanted to raise?

Because it's - this sounds like it's going to take a while.

MR. DELLAPIANA: This is going to - I mean, to seriously look at this is going to take a while. We might want to -

THE COURT: I'm thinking that we probably should just -

MR. BOEHM: Let the jury go.

THE COURT: - release the jury -

MR. DELLAPIANA: Yeah.

THE COURT: - for today, because we're going to need to resolve this issue, we also need to deal with jury instructions.

MR. BOEHM: Correct.

THE COURT: So -

MR. DELLAPIANA: Now, because Detective Reyes is sitting there, I mean, the actual questions I was going to ask-

THE COURT: Oh (inaudible).

MR. BOEHM: We never did get around to that, I guess, is that right?

MR. DELLAPIANA: And this -

THE COURT: You've got the floor.

MR. DELLAPIANA: This part, because we covered everything else, shouldn't take very long. I mean, it's clear the State -

MR. BOEHM: We're going to stay silent.

MR. DELLAPIANA: - objects to this line of questioning.

THE COURT: Well, you did invite it. You said, why don't we let him put on the record his objections?

MR. DELLAPIANA: And I think appropriately so, I did that.

THE COURT: Go ahead, Mr. Dellapiana.

Q (BY MR. DELLAPIANA) So we had just - you were talking about how James admitted that he had got in a fight with Angela Jenkins, right?

A Right.

Q And he told you why, right?

A Yes.

Q Said he started fighting with Angela because he thought she was cheating on him with her - his brother Joshua.

A Correct.

Q And this enraged him.

A Yes. I don't know if he used the word enraged, honestly, I -

Q It's in your report, though, right?

A Yes, probably.

Q Okay. And then that's when he slugged her - well, I'll say that that's when he began the assault.

A Yes.

Q All right. Now, he also claimed that she had made some statements, and this is - this goes to a few different pages, I'll tell you - you might recall them. And he said that she admitted it and she kept saying it. Remember that? It's on page 8.

A I remember at first I thought that he just suspected her of it, and so I asked him about that, and she - or he said that she was the one that told him that she was. So but not that - I don't remember him saying she kept repeating it.

Q Oh, okay. Can you look at page 8 regarding she kept saying it?

A Yeah, what - I'm sorry, what line is that? Okay, I see it. Yes, yes. She did.

Q And that - then let's jump up to page 19, and you asked - let me see if I can get you to the line. 510.

A Yes.

Q And you say, and was she telling you she wouldn't cheat again, asking you to stop? Like stop the assault?

A Right.

Q Remember that - okay. Then he says, "No, I was telling her, please tell me that, but she wouldn't. She wouldn't tell me that.

A Right.

Q "And that hurt my feelings." That's down at 520. The hurt the feeling statement -

A Yes.

Q - is that right?

A Yeah.

Q Okay. I didn't hear you (inaudible). Let's see.

MR. DELLAPIANA: That's it, I think I've made the record, Your Honor. Thank you very much for the opportunity.

THE COURT: You're welcome.

MR. BOEHM: I might have -

THE COURT: Why don't we bring in the jury -

MR. BOEHM: - a question -

THE COURT: I'm sorry?

MR. BOEHM: I may have a quick question. Let me just...

THE COURT: Go ahead, counsel.

REDIRECT EXAMINATION

BY MR. BOEHM:

Q Did the defendant ever tell you that he caught or physically viewed Ms. Jenkins having any type of a relationship with his brother?

A No.

Q And in specific, when he talked about what enraged him or what got him mad, was it the fact that she had cheated on him, or was it something else?

A She was playing games with him, she said - or, he - he said that she admitted to him that she had been playing games or cheating with Josh.

Q And, did the defendant tell you that Josh was there before this fight began?

A No.

Q Okay. Do you remember in line 238, it's on page nine, Roman numeral 10.01, again, number nine?

A Yeah. Uh-huh (affirmative).

Q Would you just read the statement of the defendant at that point?

MR. DELLAPIANA: Your Honor, I've lost track (inaudible).

MR. BOEHM: Sorry, 238.

MR. DELLAPIANA: Okay.

THE WITNESS: Go ahead and read it?

Q (BY MR. BOEHM) Please.

A "We were arguing a couple times, and my brother came, and I kind of pulled her hair and told her not to keep playing games with him, and it was over from there. Started choking her," and then it goes inaudible.

MR. BOEHM: Okay. That's all (inaudible). Thank you.

THE COURT: Okay. All right. Let's bring in the jury and - so that I can inform them that I'll be releasing

them for the day.

WITNESS: Do you want me to remain here, Your Honor?

THE COURT: No, you may step down.

(Whereupon the jury returned to the courtroom)

THE COURT: All right, you may be seated. Ladies and gentlemen of the jury, I am going to need to take some time this afternoon to review some matters of law, and jury - prepare jury instructions in conjunction with the attorneys. And so, I believe that it is going to take the balance of the day today. So, I am going to release you for the day, and we will begin tomorrow 9:00? 10:00? Do you think we need a bit more time?

MR. DELLAPIANA: If we - well - I think by -

THE COURT: Let's -

MR. DELLAPIANA: - 10:00 -

THE COURT: Let's say 10:00.

MR. DELLAPIANA: Yeah.

THE COURT: Just to make sure that we're not keeping you waiting any longer than necessary. So, let me have you return by quarter to 10 tomorrow so again we can get started, hopefully by 10:00 we should be able to be ready to call you in. If there's any difference in that, I will let you know through the bailiff. But that way you're not having to wait for - you know - extended periods of time in the jury room.

So again, I am reminding you as I have at every

time we've taken a break, you're not discuss this case with anyone, nor allow anyone to discuss it in your presence. You're not to attempt to research anything about this case, investigate anything, you must not listen to any news reports about this case, nor allow anyone to comment about any reports to you. Do not make up your mind about anything that has been presented to you until all of the evidence has been presented and the matter is turned over to you for deliberation.

Please rise for the jury.

(Whereupon the jury was excused for the day)

THE COURT: All right. So, at this point, counsel, my clerk has printed out a number of the cases that Mr. Dellapiana has cited for me. I am going to be reviewing those as well as Cruz Meza, and some of the issues of law that we've been discussing. So we will be in recess for that. I also will need to meet with counsel to address the jury instructions once we've moved beyond this specific issue.

MR. DELLAPIANA: And do you want to do the jury instructions in the morning or do you want us to wait or come back (inaudible) here, or...

THE COURT: Well, it seems to me that I need to address this issue first because -

MR. DELLAPIANA: Absolutely.

THE COURT: - the - it's foundational to what the instructions do or don't include.

MR. DELLAPIANA: I totally agree. I mean, it may be that all of the - because right now, we're - we've been going back and forth offering alternatives to each other's instructions that would relate to extreme emotional distress instruction and defense, and we haven't reached an agreement. Were you to argue - or were you to conclude that this - none of this evidence is admissible - let me just put on the record - it may be better just to skip that entirely. So, I agree that we need to let - give you time to do your legal review prior to doing instructions.

THE COURT: Okay. Let's have us reconvene tomorrow morning at 8:30.

MR. DELLAPIANA: 8:30 is fine.

MR. BOEHM: Thank you, Your Honor.

MR. RICKS: Thank you, Judge.

MR. DELLAPIANA: (Inaudible).

THE COURT: All right.

MR. BOEHM: I would just make the record that the State has not rested, that Detective Reyes, who took the stand, is not yet released, but he's released at least for the time being.

THE COURT: Just for today.

MR. BOEHM: Yes.

THE COURT: Correct.

MR. BOEHM: Thank you, Your Honor.

THE COURT: All right, thank you. And if counsel have any brief written argument that you wish to submit, get it to me by tomorrow -

MR. BOEHM: I (inaudible) - I apologize.

THE COURT: If you have any brief written argument that you wish to submit on any of these grounds - well, I - submit whatever argument you wish to make. I'm not going to limit you to a brief argument. I'm going to ask you to submit whatever you have.

MR. BOEHM: May I ask - I'm still getting used to this E-filing system, and it's led to a couple problems on my part -

THE COURT: I'm sorry?

MR. BOEHM: The Court isn't asking me to E-file something, I hope. Can I just bring it in and print it?

THE COURT: Just bring it in to me.

MR. BOEHM: Okay, thank you.

MR. ?: Your Honor, would you like him here at 8:30?

THE COURT: I believe he needs to be - he - counsel? Do you wish to have Mr. Sanchez here while we're discussing jury instructions?

MR. DELLAPIANA: We don't care (inaudible) - we need to talk to him now -

MR. RICKS: We do. We'd need to talk to him right now and we'll make that decision. There's some things we need to discuss with him (inaudible) -

THE COURT: Okay, the question is, when do we want Mr. Sanchez back tomorrow morning?

MR. DELLAPIANA: Let's have him here, just to be sure, yeah, that's a good -

MR. ?: Thank you.

THE COURT: Okay. Thank you.

(Whereupon the trial was continued)

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 111903659 ES
	:	
Plaintiff,	:	Appellate Court Case No. 20140749
	:	
v	:	Volume IV of IV
	:	
JAMES RAPHAEL SANCHEZ,	:	
	:	
Defendant.	:	With Keyword Index

JURY TRIAL MAY 19, 20, 21, & 22, 2014

BEFORE

THE HONORABLE DENISE P. LINDBERG

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

SALT LAKE CITY, UTAH - MAY 22, 2014

JUDGE DENISE P. LINDBERG PRESIDING

(Transcriber's note: Identification of speakers may not be accurate with audio recordings)

P R O C E E D I N G S

THE COURT: Good morning. I'll be right back. Excuse me, gentlemen. Thank you.

Gentlemen, I am way too old to be pulling up all-nighters which is what I had to do last night. All right. Let - we have various things that I need to rule on. We are on the record on the matter of State of Utah versus James Raphael Sanchez, case number 111903659. Let me get myself organized here. All right. I see that there is...

Okay. I want to address first the motion for mistrial. Having fully considered Mr. Sanchez's arguments, I deny the motion. A mistrial is not required where an improper statement was not intentionally elicited, was made in passing, and in the context of all the testimony presented, is relatively innocuous. And there I'm relying on State versus Allen, 103 P 3rd - I'm sorry, 108 P 3rd 730, with a pinpoint at 738 -

MR. DELLAPIANA: Judge, before you go into your analysis, there was - we didn't really make part of our record about our argument for the mistrial, and it's not on the record, I think the jury's note - we mentioned it at the

bench, but I'd like to say one thing about the juror's note because I don't think we put that on record when we were arguing previously for the mistrial. This will only take a minute, if I may.

THE COURT: Go ahead.

MR. DELLAPIANA: We did - I think the last time we argued, it was after we came back from lunch yesterday, and we brought up the fact that we had got notice of a headline where they said it - accused says, "I think I might've killed her this time." The Court made a - I think a reasonable assertion that just because the media picked up on that, didn't mean that the jury picked up on it. And I thought, well, perhaps that's true, at least until we got the subsequent question from the jury, which was, as I recall, to the effect, has the defendant assaulted her before, or something to that effect. And then, I think we knew, I think without any doubt at all, that the matter was not overlooked by the jury, and I think considered together with the prior inadmissible evidence that came in, shows that there's a strong probability of prejudice to the defendant in this case. That's all.

MR. BOEHM: May I -

THE COURT: I respectfully disagree.

MR. BOEHM: And may I respond just (inaudible)?

THE COURT: You may respond.

MR. BOEHM: The question that was asked by the jury about any prior assaults wasn't asked yesterday - or excuse me, it wasn't asked on Tuesday when the concerning testimony was elicited. It wasn't asked of the witness who gave the concerning testimony. It was asked yesterday on Wednesday during Detective Reyes - at the close of Detective Reyes' testimony. And I think it was specific to whether Detective Reyes himself knew of anything, and the Court instructed them that that was not proper, that couldn't come in. The fact that he was asking Detective Reyes means he may want to know if there was something, but he didn't know. And the fact that he doesn't know means that there's nothing for them to consider.

THE COURT: And I think Mr. Boehm has summarized it just, probably better than I would have. The basis for why I don't believe that the note from the juror that arose at the near conclusion of Detective Reyes's testimony, in any way, could be considered to relate back to the statement made by the - effectively the first or second witness in this case.

In - I've looked at State versus Walk, I've looked at State versus Decorso, in all of these the court declined to grant mistrials when witnesses made improper references to crimes that the defendant had allegedly committed, and in this case, the response by Mr. Warner was in response to a question by Mr. Boehm, I believe it was, that, you know,

didn't he tell you that, I think I might have killed her? That's a question that simply required a yes or no answer. At that point Mr. Warner then, you know, volunteered the statement that added the - at this - you know, "this time." The statement, as has been noted, the jury thereafter, at the conclusion of the testimony of Mr. Warner, was given the opportunity to ask questions of Mr. Warner. In no way was there any question that was - that picked up or responded to any suggestion that arguably could've come from that volunteered statement. It seems to me that if the issue had been present in the minds of the jury, that would've been the time when that question would've been expected, not at the conclusion of the State's case a day later.

Additionally, I must consider the totality of the evidence that has been admitted, including most notably the extensive admissions by the defendant himself. Considering that the statement was made in passing, it was not dwelt upon by either counsel or the Court, the matter moved on, and when compared to the totality of the evidence, it is - if it was error, it was at best harmless error.

Now, the defense has sought to introduce, through the testimony of Detective Reyes, evidence regarding certain statements made by the defendant, I am understanding, or I'm assuming, for the purpose of establishing a basis for asserting the special mitigation defense of extreme emotional

distress. Specifically, the defense wishes to introduce statements either allegedly made by the victim, either admitting or suggesting that she'd been involved sexually with the defendant's brother, and/or defendant's own statements of his belief that the victim was having sexual relations with his brother. The defense counsel has offered various alternative grounds for why that testimony should be heard by the jury. Specifically, the defense contends that failure to allow that evidence violates the Sixth Amendment Confrontation Clause, that the testimony is admissible under the Rule of Completeness and/or Rule 106 of the Utah Rules of Evidence, under some unspecified rule, which I understood to be 608C, to show bias on the detective's part; as a non-hearsay statement under 801C2, because it's not being offered for the truth of the matter asserted, or as hearsay that falls within the then existing state of mind exception under Rule 803-3.

I have considered each of these grounds separately, and I conclude that none of them form a basis for allowing introduction of that testimony. In making that consideration, I have read all of the cases that were cited by the defense and provided to me, as well as my own research.

With respect to the Sixth Amendment argument, the Confrontation Clause speaks to the defendant's right to be

confronted with witnesses against him. To the extent he is seeking to elicit his own exculpatory statements through the detective, on its face it is clear that his statements are not the statements of a witness against him. To the extent that he's seeking to elicit statements he attributes to the decedent, they would at best be double hearsay, none of which falls under an exception was cited. At worst, he would be unable to benefit from the victim's unavailability, that by his own admission he created, and the alleged statements would not fall within any of the exceptions to Rule 804.

As to his arguments about - based on the - it was originally cited as the Rule of Completeness. But I will discuss it under both Rrule of Completeness and 106, because the defense subsequently submitted a document making a case under 106. The Rule of Completeness is a common law rule. Our Supreme Court has held that, where the oral - and it's a strictly oral statement, it's not been reduced to writing, the Rule of Completeness may apply under Rule 611. That was not argued to the Court. And certainly no analysis has been put forward with respect to Rule 611. But, in any event, the Rule of Completeness does not apply in a case like this one where, what we have at issue, is the defendant's contemporaneously recorded interview, which was then transcribed, and in State versus Leleae, I'm not pronouncing that correctly, but it's L-E-L-E-A-E, 993 P 3rd 232. In that

case, the - a detective conducted an interview with the defendant. The defendant's statements were tape recorded and then transcribed. At trial, the defendant's statements against interest were introduced through the detective. The court found that, although the defendant's oral statement was introduced through the detective, the statements were recorded and transcribed, and Rule 106 applied - actually, were sought to be introduced. The appellate court upheld the denial of the defense's motion to introduce the entire statement of the defendant for the purpose of, quote, "putting the prosecution's requested portion in context." The Court of Appeals held that the trial court had not abused its discretion, and decided that this statement should be included - excluded.

In this case, as in that - and that one, the defendant's oral statement during his interview with Detective Reyes was recorded and transcribed. As such, they fall within 106, and not under the Rule of Completeness referenced by the defense in its argument initially. Under 106, the Court must apply a fairness standard in evaluating the need for admitting the remainder of a written or recorded statement. And under that standard, the court needs to admit only those things that are relevant and necessary to qualify, explain, or place into context the portion that has already been introduced. Here, the defendant seeks to admit

statements that are essentially a self-serving, after-the-fact explanation for his conduct in assaulting the victim, and that portion of that overall interview was temporally removed from the inculpatory statements that had been received without objection on the basis of 801-B-2.

I conclude that the fairness analysis does not require the admission of the statements offered to explain the reasons for his brutal assault on the victim.

Now, initially the defense cited State versus Cruz Meza in support of his claim that the statement should be received. I disagree. In Cruz Meza, the defendant confessed of his murder to a third person, which was an oral statement. There the trial court analyzed it essentially under the common law rule and excluded it on the basis that the statements were not made spontaneously, and lacked the indicia of trustworthiness or reliability. The Supreme Court upheld the trial court's exercise of its discretion.

In any event, I believe Cruz Meza is distinguishable, because the statement at issue was a strictly oral statement, and the admissibility analysis was made under the common law Rule of Completeness, not under 103, which the defense has now made clear it is - that is the sole basis that it is proceeding under.

MR. DELLAPIANA: You mean 106? Or -

THE COURT: I'm sorry, 106. I apologize.

MR. DELLAPIANA: Oh.

THE COURT: I mis-spoke.

Now, I will note that that last analysis or statement submitted by the defense was done as, quote, a reply to the State's motion in limine. I remind counsel that I had stricken the State's motion, and had not considered the motion in limine because it had been untimely filed. So there really was nothing to reply to. But, I had invited counsel to submit any additional briefing, which the State has now provided, and which the defense provided to me yesterday evening.

I also find no merit in the argument that the defendant's statement must be received presumably under Rule 608C to show the detective's alleged bias. The defense has certainly not pointed to any specific facts that would support or show that Detective Reyes's testimony was simply factually reported on the defendant's inculpatory statements, is in any way tainted by bias. The detective's testimony was nothing more than a straightforward response to questions put to him by both the prosecution and the defense.

I similarly reject their claim that the statement is not being offered for the truth of the matter asserted, and therefore it's not hearsay. If the defendant's explanatory statement is, in fact, not being offered for the truth of the matter asserted, then the defense has failed to

articulate its relevance. And, as such, under Rule 402, irrelevant evidence is not admissible.

Finally, the defense asserts that the statements are admissible under the hearsay exception to Rule 803-3 as evidence of the defendant's motive for acting as he did and assaulting the victim. I will admit that this one was a much closer call. In State v. (inaudible), 780 P 2nd 1221, the defendant challenged the admission of his hearsay statement, that if his wife ever left him he would kill her. The Utah Supreme Court held that the trial court had not erred in admitting the statement, because it was relevant to the - and the statement certainly reflected the defendant's mental state, and the jury could infer his intent to murder his wife based on that statement. And, in that case, the court did state the rule that hearsay evidence that shows the defendant's mental state prior to the commission of a crime is admissible under 803-3, if the statement was made under circumstances that indicate its reliability, and is relevant to show intent, planned motive, when the State's - defendant's state of mind is at issue in the case, or is relevant to prove or explain acts or conducts of the defendant. Notably, the statement at issue in Debello was an inculpatory statement that arguably could've also come in under Rule 801-D-2 as a non-hearsay statement being offered against a party opponent.

Similarly, in State versus Auble, 754 P 2nd 935, the court admitted under Rule 803-3 that hearsay statements of the decedent to a third party shortly before her death to the effect that the defendant had threatened her life. The court held those statements were admissible as evidence of the decedent's state of mine. In doing so, the state relied on State versus Wauneka - Wauneka - I'm not sure how to spell it - it's W-A-U-N-E-K-A, 560 P 2nd 13677, where the court generally enunciated rules of admissibility of out of court statements made by a homicide victim who reported threats of death or serious bodily injury made by the defendant.

In this case, the defendant is seeking to admit his arguably exculpatory or self-serving statement on the basis that it is relevant to show his motive or to explain his conduct. Even if this were true, however, the defendant has failed to meet the first part of the Debello test, which is that he has failed to show that the statement was made under circumstances that indicate its reliability and trustworthiness.

More recently, in State versus Marchette, the defense sought to introduce under 803-3 hearsay exculpatory statements that he had made in a phone call to a victim of sexual assault in that case. The investigating detective had set up a scripted, recorded, pretext call between the defendant and the victim, and his statements during that call

demonstrated his belief that the victim had consented. Marchette's statements in that recorded telephone call were made several days after the charged event occurred, and the court concluded did not amount to evidence of his state of mind as it existed during his encounter with the victim. The trial court declined to admit the inculpatory statement as inadmissible hearsay, and the Court of Appeals affirmed.

In this case, although the defendant's exclamatory statement was made the day following the event at issue, rather than several days later, that by itself does not reassure the Court of the trustworthiness of the statement, and the defendant has not offered anything to support the conclusion that the statement is trustworthy. Rather, as I have already indicated, the statement is an after-the-fact explanation that seeks to minimize his culpability for his admitted conduct towards the victim. Thus, although the Supreme Court has recognized situations under which certain hearsay statements that reflect state of mind are properly admissible, the Court concludes that this is not one of those situations.

Finally, even though I'm not accepting any of the grounds that have been proffered by the defense for admissibility of the testimony, I'm not sure that the defense has really thought through the potential implications had I ruled the other way. Had those statements been introduced,

it would certainly open the door for the defense - for the prosecution to then put on all the evidence of the defendant's prior convictions for his assaultive behavior on the very same victim just a few weeks prior, which would've totally undercut his emotional - extreme emotional distress defense - special mitigation, that this was an out of character, extreme, overwrought, emotional response to a triggering event. But, since I'm denying it, we don't need to even go there.

Given that conclusion, however, I do not need to address jury instructions having to do with extreme emotional distress because, at this point - and I will invite Mr. Dellapiana to make a record of this - I am not persuaded that there is sufficient cognizable evidence to present that defense to a jury. But I would certainly invite Mr. Dellapiana, if he believes that he wants to make a record of what evidence he believes - cognizable, admissible evidence, that is already a matter of record, that would allow this matter to go to the jury, you're welcome to make that record.

MR. DELLAPIANA: Your Honor, based on your rulings, there is none. I don't think that without that evidence, the defense has a basis to argue special mitigation.

THE COURT: All right. So now -

MR. DELLAPIANA: I do have an alternative defense I'd like to file a requested instruction for, however.